88-2096

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-5617
No. 88-5521

ROBERT J. BOLTON, ET AL.,
Petitioners,

vs.

TESORO PETROLEUM CORPORATION, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Where evidence on post-trial motions discloses to the trial court: (a) observed repeated fraternization between a bailiff and a juror (including being seen together outside of the courthouse); (b) introduction thereafter of extraneous prejudicial factual allegations in the juryroom during jury deliberations; (c) a juror complaining to another bailiff to disclose to the judge that she observed juror and bailiff misconduct and that extraneous information was in the juryroom which the juror believed was coming in through such bailiff; and (d) suppression by the bailiffs and the United States Marshal's office of the juror complaints and of that misconduct from the court; against this background does a non-evidentiary "hearing" by the trial court violate the right to a trial by a fair and impartial jury, the right to confront witnesses, and due process guarantees when the court: (1) prevents the attorneys from questioning jurors at the post-trial hearing; (2) refuses to recall jurors or to permit counsel to question jurors when their statements *in camera* to the court are refuted by other jurors, are refuted by court bailiffs and other court personnel, and where additional allegations are made to the court thereafter about those previously-questioned jurors by others on the jury; (3) refuses to inquire or to permit counsel to inquire as to how the extraneous prejudicial information got into the juryroom or was disclosed to the jurors; (4) refuses to question or permit counsel to question the bailiffs and the marshals involved about the fraternization with the jurors, the juror complaints and the non-disclosure to the court of the jurors' complaints and misconduct; (5) refuses the attorneys access to a bailiff's recorded statement describing the fraternization, the suppression of reports of misconduct from the court made by one of the bailiffs who was arrested because of his involvement in the coverup (despite the fact that the court read it and that petitioner's counsel had permission from that bailiff and the United States Attorney to see it and

to use it at the hearing on post-trial motions); and (6) directs the United States Attorney not to disclose to petitioners the facts relating to such bailiff and juror misconduct.

Answered "no" by the lower courts.

2. Upon receipt of evidence of a) observed repeated fraternization between a bailiff and a juror; b) introduction thereafter of extraneous prejudicial factual allegations in the juryroom; c) complaints by the jurors to the Marshals; and d) suppression of that information by the Marshals from the court, must a court shift the burden of proof in determining whether a new trial should be granted, and must the court factor that evidence into determining the format, structure, content and inquiry of and in a hearing to review the jury verdict?

Answered "no" by the lower courts.

IDENTIFICATION OF PARTIES

ROBERT J. BOLTON, ET AL.,
LEO A. WALKER, III
MEMBERS OF CLASS AS CERTIFIED BY COURT BELOW,
Petitioners,

TESORO PETROLEUM CORPORATION, ET AL.,
ROBERT V. WEST, JR.
M. RICHARD STEWART
Z.D. BONNER
PETER M. DETWILER
CHARLES WOHLSTETTER
L. ROBERT FULLEM
RICHARD E. DEEMS
THOMAS C. FROST, JR.
JOHN MCKETTA, JR.
ARTHUR SPITZER,
Respondents.

QUOTATION/CITATION OF LAWS/ AMENDMENTS/RULES

Rule 606 of the Federal Rules of Evidence — Competency of Juror as Witness

(a) At the Trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which he is sitting as a juror. If he is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, *except that a juror may testify on the question whether any outside influence was improperly brought to bear upon any juror.* Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes. (Emphasis added).

Petitioners will also rely for relief upon the Fifth, Sixth and Seventh Amendments to the Constitution of the United States.

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IN THE

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ROBERT J. BOLTON, et al.,

Petitioners,

vs.

TESORO PETROLEUM CORPORATION, et al.,

Respondents.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit denying the petitioners a new trial.

OPINION BELOW

The opinions of the Court of Appeals are reported but not yet published. Copies of the orders and opinions of the lower courts are attached hereto as Appendices A and B.

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals was filed on April 24, 1989. The jurisdiction of this Court is invoked under and pursuant to 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

After a four-month trial on securities fraud and racketeering claims, and reported impasse in the juryroom, a six-member jury returned a verdict for defendants on all counts. Thereafter, the press reported juror complaints of coercion and harassment in the juryroom. Those allegations were followed by juror reports that at least one member of the jury had been meeting frequently (and impermissibly) with one of the Court Security Officers assigned to the trial. Further complaints followed, stating that extraneous information, prejudicial to the plaintiffs, had been introduced into the juryroom. Then, another Court Security Officer contacted plaintiffs and stated that he could prove that the jury process had been subverted, but that he wanted money in return for performing his duty to act on receipt of that information. Plaintiffs turned the matter over to the appropriate authorities; the Court Security Officer was arrested; and he apparently revealed his information thereafter to the arresting authorities. He entered a guilty plea. As part of the plea bargain he agreed to cooperate fully in the jury tampering investigation.

Plaintiffs sought a hearing to inquire into these specific allegations. The trial court fashioned an *in camera* examination in which the court: a) barred the attorneys from calling or questioning witnesses; b) conducted a whitewash of the situation in the guise of an investigation, by leading the juror witnesses away from complaints of coercion, influence, and juror/Court Security Officer meetings; c) refused to call or question the Court Security Officers implicated; d) failed or refused to inquire as to the source when

presented with evidence that the two holdout "defendants jurors" had resorted to introduction of extraneous information in the deliberations; e) refused petitioners access to the Arrest Transcript of the Court Security Officer who had evidence of the misconduct and coverup, and barred access to or information from the U.S. Attorney (who had received permission from the Court Security Officer to cooperate in the inquiry); and f) failed to shift the burden of proof to the defendants once evidence of these wrongs slipped through the screen thus erected by the form of the hearing.

On November 6, 1987, the United States District Court for the Western District of Texas denied plaintiffs' motion for a new trial. On February 17, 1988, the United States Court of Appeals for the Fifth Circuit summarily denied plaintiffs' petition for writ of mandamus to compel the lower court to reopen the record and to conduct a full and fair hearing (before a judge of another district) on these issues. On April 24, 1989, the decision of the trial court, denying plaintiffs' post-trial motions, was affirmed by the United States Court of Appeals for the Fifth Circuit.

ARGUMENT

I. *The constitutional guarantees of due process, the right to confront witnesses, and the right to a trial before a fair and impartial jury require a full evidentiary hearing with the right for counsel to examine court security officers (bailiffs), and with full inquiry of jurors, where there is evidence of extraneous information entering the juryroom, plainly through observed court personnel involvement with jurors, and against a background of juryroom coercion and the suppression from the court, by its personnel, of juror complaints of such misconduct as affecting and harming their deliberations.*

II. *Upon receipt of evidence of a) observed repeated fraternization between a bailiff and a juror; b) introduction thereafter of extraneous prejudicial factual allegations in the juryroom; c) complaints by the jurors to the Marshals; and d) suppression of that information by the Marshals from the court, a court must shift the burden of proof in determining whether a new trial should be granted, and the court must factor that evidence into determining the format, structure, content and depth of inquiry at a hearing to review the jury verdict.*

This matter arises from a complaint alleging that defendants, Tesoro Petroleum Corp. ("Tesoro") and its highest officers, clandestinely arranged to misrepresent and/or to withhold information from Tesoro shareholders which was material (indeed, critical) to their investment decisions. Plaintiffs also alleged that defendants had engaged in a pattern of racketeering, and plaintiffs brought derivative claims for breach of fiduciary duty and concerning offers to purchase Tesoro which were concealed by the individual defendants.

After a trial of approximately four months, the jury deliberated for three weeks. The jurors became split, four to two, for plaintiffs. After thirteen days, the jury reported an

impasse to the court. Unbeknown to the court, the minority jurors (Jury Foreman Joseph Mullins and Juror Tammy Albrecht), who had held out for a defendants' verdict, were at that point harassing and coercing the majority jurors and were resorting to the introduction of extraneous, non-record information (passed off as fact). Also unbeknown to the court, the majority jurors attempted to convey a written complaint to the court, via the Court Security Officers and the United States Marshal, but those complaints were concealed and buried by the Marshal's office. Lacking such facts, the court sent the jury back to resume deliberations and appeared (by its lack of response) to give its blessing to the shenanigans of the Jury Foreman and his fellow juror. The majority jurors at that point gave up, and a defendants' verdict was returned. Despite the supposed secrecy of those deliberations, when the verdict was announced, the Court Security Officer somehow knew to select only Mullins and Albrecht to meet with the press, and to whisk the other jurors away.

Shortly afterward, juror complaints were reported in *The Wall Street Journal* and in the *San Antonio Express News* that the verdict was unfairly reached. The *San Antonio Express News* interviewed jurors Gloria Ochoa and Catherine Broff. "Foreman Bullied Tesoro Jury, 2 Say", (*San Antonio Express News,* September 4, 1987). Two jurors revealed that during the deliberations Jury Foreman Mullins screamed at them. Mullins and Juror Albrecht threw papers at Broff at another point in the deliberations. As Ochoa stated, the verdict was reached because, after the nightmare of those deliberations, "We gave up". Juror Broff disclosed that "I think the verdict would have been different if not for the coercion and badgering".

On the day after that article was published, the *Express News* published an interview with additional jurors (*San Antonio Express News,* September 5, 1987, "Tesoro Jurors Charges Mount"). Juror Nancy Torres complained to the

Express News of extraneous information having been introduced in the deliberations.

Concurrently with the publishing of *The Wall Street Journal* article, a Court Security Officer, Finton "Ed" Stewart, approached counsel for plaintiffs and stated that he (Stewart) had evidence that the jury process had been subverted. He tried to sell to the plaintiffs, for $1,000,000.00, his duty to report that information to the court system. The plaintiffs would have no part of it. They brought the information of Mr. Stewart's misconduct to the federal authorities. A meeting was arranged with Stewart. The meeting was attended by an F.B.I. undercover agent. Stewart was handed part of the money demanded by him. C.S.O. Stewart stated that the "jury was definitely compromised" and that "there's one piece of paper that spells it [out]." (See Federal Arrest Complaint). Stewart was arrested, and subsequently gave a complete statement to the F.B.I. (Statement of Assistant United States Attorney Wayne Speck at the hearing on the Motion for Rearraignment and Plea Before the Honorable D.W. Suttle, 10/9/87, p. 23). Apparently, transcripts of the arrest sequence and of Stewart's statement to the F.B.I. exist. They were withheld from the litigants, however, by the trial court. (Transcript, 11/6/87, p. A-4627). (Hereinafter, these transcripts will be referred to as "the Stewart Arrest Transcripts".) The Court of Appeals received and reviewed the Stewart Arrest Transcript, yet made no reference to it in affirming the order of the trial court.

C.S.O. Stewart sought and received a plea bargain agreement. Stewart's end of the plea bargain was simple. Stewart offered "to be cooperative with the government and with the Court and will testify truthfully concerning any matters relating to this investigation and in the Court's inquiry into jury tampering" by telling what he knew, fully

and forthrightly.[1] He confirmed that offer at the hearing on his guilty plea. (Transcript, 10/9/87, p. 12.) The opportunity to *fulfill* his end of the bargain was then denied.

Plaintiffs filed a supplemental motion for new trial and requested an evidentiary hearing. Plaintiffs made a detailed offer of proof of fraternization outside of court between at least one Court Security Officer and at least one juror of coercion and harassment in the juryroom; of the introduction of extraneous information by jurors in the juryroom; and of suppression of juror complaints of such misconduct by the court personnel. These pointed allegations would then be fleshed out through examination and testimony of the jurors and Court Security Officers. The court refused the offer. At the hearing, plaintiffs also offered to prove that the Marshal's Office decided that it would inform the court of the majority jurors' complaints only if Tesoro *lost*. (Transcript, 11/6/87, p. A-4615).

The court began by barring examination of *anyone* under oath, by any party. It barred plaintiffs from access to or use of the Stewart Arrest Transcripts. (See Transcript of Sentencing of C.S.O. Stewart, 12/16/87, pp. 40-41). The court also would not permit Assistant United States Attorney Speck to meet or talk with plaintiffs or their counsel. (Transcript, 11/6/87, p. A-4615).

The Court questioned Jurors Mullins and Albrecht first, *in camera*. From all accounts, Mullins and Albrecht had been the "two who swung the four" to a defendants' verdict. Having denied the attorneys any opportunity to examine Mr. Mullins and Ms. Albrecht, the court then conducted a "kid gloves" inquiry, refusing to probe at all beyond the original response to the questions. As the court

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1. Letter, 10/8/87, from P. Joseph Brake (counsel for Stewart) to Wayne Speck, Assistant United States Attorney for the Western District of Texas.

said, with regard to any possible juror/Court Security Officer fraternization allegations, "It doesn't make a particle of difference to me, but is there anything you want to tell me about that?" (Transcript, 11/5/87, p. A-4563). The court underscored its position shortly thereafter: "I just thought if you wanted to explain something, fine, but you don't have to. All right." (Transcript, 11/5/87, p. A-4564).

Mullins and Albrecht nevertheless admitted that extraneous information about mental illness suffered by the former wife of the key individual defendant, Robert West, had been passed on to the jury. That was discussed in evaluating the conflicting testimony of defendant West against that of his former secretary, Maureen Bates. The jury could certainly have been swayed toward Dr. West in sympathy for the problems he had to endure from his then-wife.[2] Even then, instead of investigating further, the court simply asked a leading question to establish that Mr. Mullins, the Foreman, told the jury to disregard that wrenching information even as he exposed the others to it. (Transcript, 11/5/87, p. A-4562).

The court then interviewed Jurors Broff, Ochoa and Torres. The court thus heard that Jury Foreman Mullins told the jurors that they were not to consider the trial testimony as evidence (Transcript, 11/5/87, p. A-4582); that Foreman Mullins would not let the jurors voting for plaintiffs review the evidence (Transcript, 11/5/87, pp. A-4582, A-4589); and that he refused Juror Broff's request to write a note to the trial judge about the problems in the juryroom and that she wanted to speak to the judge (Transcript, 11/5/87, p. A-4585). Juror Broff disclosed that more extraneous

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2. Plaintiffs have also become aware that Mullins and Albrecht managed somehow to learn and to relate to the jury an incident in which Mrs. West drew a gun on Dr. West — information which was not introduced at the trial. Plaintiffs asked the court to inquire of the jurors as to that disclosure. The court ignored the request. (Transcript, 11/6/87, pp. A-4604-5).

information was insinuated into their deliberations by Mullins and Albrecht.

The court asked a few leading questions to create a record that Juror Mullins, in effect, charged the jury to pay attention only to the evidence presented at trial each time he or Juror Albrecht dropped another juicy extraneous item on the table, as if the incantation of that perfunctory instruction would cleanse the individual and cumulative incidents described above.

The court also avoided further disclosure of this kind of damaging information by simply failing to ask the necessary, appropriate questions. Thus, in the face of all these startling disclosures, the court in its own questions never even asked Mrs. Broff whether she observed fraternization between any Court Security Officer(s) and any juror(s). It was only upon prompting by the law clerk that this critical question was asked — and even then, not directly. Again, in direct contravention of the earlier testimony of Jurors Mullins and Albrecht more critical information spilled out:

> "MR. PRIMOMO (the Court's law clerk): I'd ask the question concerning any of the security officers, contacting them.
>
> THE COURT: I did. Did you contact any of the security officers?
>
> MRS. BROFF: What, during the trial?
>
> THE COURT: Yes.
>
> MRS. BROFF: Yes, I told the security officer about, I asked him if during the trial, you know, were we supposed to talk to the security officers, and he said no.
>
> *Because Tammy Albrecht would go out there every day and talk to one of the security people, so that's why I thought maybe a security officer was leading her on towards the Tesoro side because she knew about Dr.*

West's wife, and unless she knew Dr. West, how would anybody know about that situation?

THE COURT: Okay.

MRS. BROFF: So I told him, and I don't know who he went and told, but I don't know what was said.

THE COURT: Do you know who the security officer was that you talked to?

MRS. BROFF: I don't know any of their names.

THE COURT: Okay. Was he out here?

MRS. BROFF: Yes, he was right by the door when we came in. He was at our door.

THE COURT: So you went and asked him if you were supposed to be talking to any — if you were supposed to be talking to the security people?

MRS. BROFF: Right. *And she talked to him just about every day after we'd come back from lunch.*

THE COURT: Okay. And the information, the extraneous matters, if any, that came in had to do with Dr. West's wife?

MRS. BROFF: Right. *Now, I don't know how she would have found that out. I thought, you know, he might have told her, and so I told the security guard.*

I also had asked Mullins to write a note for me to see you and he never would. (Transcript, 11/5/87, pp. A-4584-4585.)

(Emphasis added).[3]

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3. Jurors Albrecht and Mullins had told the court, before Juror Broff testified, that any idea that Albrecht had been in such contact with a Court Security Officer was, in Mullins' words, "preposterous". (Transcript, 11/5/87, p. A-4578). The court simply adopted the denials of those jurors without any probing after the refutation of those denials.

The testimony of Juror Broff was then confirmed and expanded by Jurors Ochoa and Torres. Juror Ochoa testified that (jury foreman) Mullins would not let her review plaintiffs' evidence. (Transcript, 11/5/87, p. A-4589). Juror Torres recalled yet another item of extraneous information introduced to taint the jury's deliberations. She recounted how the jurors were told by Mullins details of the most sensitive kind — an alleged settlement proposal whereby the class claims would be dropped in favor of a straight monetary settlement awarding funds to the individual plaintiffs and their counsel, which was allegedly rejected by defense counsel.

This time, even the court was taken back (albeit only momentarily):

> "MRS. TORRES: Okay. Something about Rosen (lead counsel for plaintiffs) and Mr. Miller (lead counsel for defendants) having things settled, getting things settled, and Mr. Miller had told Rosen that — oh, no, or Rosen, one or the other, said why don't you pay the exshareholders what you owe them and then we'll drop this whole thing, and Mr. Miller said no.
>
> THE COURT: When was this?
>
> MRS. TORRES: During our jury duty.
>
> THE COURT: During the trial?
>
> MRS. TORRES: Uh-huh.
>
> THE COURT: Or during the deliberations?
>
> MRS. TORRES: Deliberations.
>
> THE COURT: Deliberations. And who said this?
>
> MRS. TORRES: Mullins.

THE COURT: Mullins said this?"[4]

(Transcript, 11/5/87, pp. 4593-4).

The effect of Mullins' comment to the jury was so profound that they ". . . just stared at him." *Id.*

In closing arguments defense counsel had launched a personal attack against plaintiffs' counsel, insinuating that they and their name clients had only their individual avarice at heart, and were not truly representing a class. Yet, in the juryroom Mullins wielded an even more prejudicial weapon — the extraneous "information" of supposed *actual settlement discussions* — presented as *fact*, as described above; and he did so without judicial monitoring, also dissipating any effect of the earlier cautionary instruction.

What would have happened if, at trial, defendants' counsel said, "Why just the other night, counsel for plaintiffs even approached us and *said*, 'I'll dismiss the class and derivative claims' if you'll just pay off my individual clients and me."? A mistrial would have happened — on the spot. That sequence is only worsened when the remarks are made by the Jury Foreman, in the privacy of the juryroom, protected from the remedial reach of the court by the secrecy of those deliberations and by a Marshals' Office which would act as a wall between the jurors and their Judge, to blindfold the Court against complaints of those jurors and against knowledge that at least one juror had obviously been reached by someone who was feeding him/her allegations of

4. The reason for leading Mrs. Torres to state that the allegation was brought into the juryroom during "deliberations" rather than at trial was plainly to lay the groundwork for *avoiding* further inquiry. Federal Rule of Evidence 606 places no restriction on the inquiry unless the extraneous information was introduced during the deliberations. From this transcript even that question is not clearly answered. It appears that the questioning may have confused the witness. For this reason alone, the matter should be remanded; but the record of abuse of discretion (and of petitioners' due process guarantees) is, as noted, far more substantial.

the most damaging kind for plaintiffs. The court *had* to ask who told Juror Mullins of the alleged settlement proposal, but it did not inquire.[5]

Obviously, the court would now fully question the jurors who had been berated and misled into compromising their view that plaintiffs should receive relief. It would zero in on the contacts between the Court Security Officer and Juror Albrecht. The court would probe as to where these "facts" came from, and as to any influence exerted by the person who transmitted these statements. It did no such thing. Obviously, the court would now also allow counsel to examine the Court Security Officers thus implicated by the complaining jurors' testimony. Plaintiffs' counsel had listed the Court Security Officers as expected witnesses. Court Security Officer Stewart was present and willing to testify. The court, however, again cut off the examination.

The court totally refused to allow any questioning of, or testimony by, its Court Security Officers. Then, generating an even sharper appearance of an improper whitewash, the court cloaked the investigation with its own robe, saying that plaintiffs' counsel could not speak with the United States Attorney (thereby also preventing counsel from seeing the transcript of the F.B.I. interview with Court Security Officer Stewart); saying that it would perform its own (private) investigation; refusing to keep the Record open pending any investigation of jury tampering; and denying any right of counsel to hear, present or adduce *any* additional testimony. (Transcript, 11/6/87, pp. A-4627-8).[6]

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5. Curiously, in its effort to avoid a retrial of this matter, the Court of Appeals added a gloss to these facts. It stated that the extraneous information had simply been "overheard" at some point by Juror Mullins (rather than being passed to him by an outside source). (Opinion of the Court of Appeals, A-24) No such evidence exists anywhere in this Record.

6. It is respectfully urged that the Court obtain and review the Stewart Arrest Transcript. Petitioners have still been denied access to it, even though C.S.O. Stewart has now been sentenced.

What was it that the court was so vigilant in refusing to allow on the Record? What did the court learn in its own investigations and in its review of the Stewart Arrest Transcript? We were not allowed to know. The trial court simply denied the motion for a new trial, finding insufficient basis for such relief in its sculpted Record. The Court of Appeals received and reviewed the Stewart Arrest Transcript, and made no reference to it in affirming the order of the trial court.

The opinion of the trial court attempts to *isolate* each element of the wrongdoing. It thus urges that the presence of extraneous information in the juryroom *in and of itself* may be minimized. The court isolates the problem of coercive behavior by two jurors and holds that this fact *in and of itself* is an "intrajury" matter into which the court can inquire no further. The court isolates the fact of the violations in the Marshals' Office and urges that this fact *in and of itself* requires no further inquiry (except, as stated by the court at argument, a *private* inquiry by the court).

The case law, however, does not contain a precedent in which there was a *pattern* of wrongdoing of every kind — bailiff/juror fraternization, pollution of jury deliberations with extraneous information, coercive behavior in the juryroom, refusals to convey to the court juror complaints about such misconduct, and a cover-up in the Marshals' Office. The express exceptions in the language, history and advisory comments concerning Fed.R.Evid. 606 *welcome* inquiry into these areas. The exceptions were made for just this situation, yet the court closed off any such examination through the approach described above. The court held that the system *worked.* A verdict was reached after a long trial. A mistrial or a new trial *was* avoided. Due process and the right to trial by a fair and impartial jury were molded to the needs of expediency.

The real basis for the actions of the trial court and of the Court of Appeals appears to have been that this was a long trial, and that any verdict should, therefore, be disturbed only upon *especially* horrendous error. The Court of Appeals went so far as to quantify the volume of the record as a preface to its discussion. Respectfully, jury tampering is jury tampering. A constitutional violation cannot be disregarded because the trial took five months or five minutes. A rose is a rose is a rose, and a thorn is a thorn is a thorn.

The trial court opinion begins with a discussion of the concerns underlying Rule 606, and summarizes those concerns as based on the desire to preserve the sanctity of the *juryroom* (Opinion of the trial court, A-2). Those concerns plainly do not, therefore, apply to questioning of *non-jurors* (here, the bailiffs), about events which occurred *outside* of the juryroom (fraternization between a bailiff and a juror, conveyance by a juror to a bailiff of a complaint for the court, and the decision of the Marshals to keep that complaint and information from the court). Under the trial court's own analysis, there was no basis for barring examination of those court personnel by petitioner's counsel.

The trial court received a proffer of evidence from petitioners, to be adduced through testimony of the court personnel. The evidence would confirm that Juror Albrecht was observed away from the courthouse premises, meeting alone with Court Security Officer Dario Guerra. Petitioners sought to question C.S.O. Guerra about such contacts, and about any information conveyed to that juror by him in those meetings, or in any other sessions between them, on or off courthouse premises. The inquiry was a pointed one; the offer could not be made more specific than the testimonial basis that supported it, because further means of proof were in the hands of the person to be questioned. It was justified, proper and appropriate. Nevertheless, the lower courts sought to excuse the curtain drawn on this inquiry by

mischaracterizing petitioner's exercise of rights as a "fishing expedition". (*Cf.* opinion of the Court of Appeals at A-24.)

Further, the trial court heard one juror complain: (1) of juror/bailiff fraternization and (2) of introduction thereafter by that other juror of extraneous information. The complaining juror naturally deduced that the outside information must have come from the outsider — the bailiff. Apparently in an effort to protect a verdict reached after an arduous trial (and to shield complaining jurors who instead wanted to testify fully), the trial court then executed an incredibly acrobatic feat of logic. It was faced with two diametrically opposite lines of testimony. On the one hand, it heard from jurors who observed outside fraternization between one of their own and one of the court's own, followed by inside (the juryroom) use of information far beyond the trial record, against a background of continuing harassment and behind a wall erected by court personnel against their efforts to have the court learn of this misconduct and stop it. On the other hand, it listened to a simple denial of those pointed observations by the jurors thus accused. In such circumstances, the trial court created the expedient tactic of deciding that the denying jurors were more credible than the accusing jurors (because the accusing jurors lacked *direct* proof that the extraneous information was actually passed on by the bailiff, the proof being in the hands of the bailiffs), and *then* using that determination to bar, as "moot", any inquiry of those bailiffs. Respectfully, this is outrageous. The Court of Appeals then refused to reach the merits of this situation by, instead, incanting the canard that areas such as these are matters of discretion. (See opinion of the trial court, pp. A-2-6, 7-8; opinion of the Court of Appeals, pp. A-24-25.) The trial court even went so far as to attempt to shore up its theory for denial of relief by stating that the trial lasted for approximately five months, and that "a preponderance of [the] evidence did not favor plaintiffs, lessening any possibility of prejudice." (Opinion of the lower

court, p. A-5.) The trial court, after hearing that same evidence, sent this matter to the jury. How can the musings of the trial judge, if *he* were a juror, be brought into play to decide how to rule on foul play in the course of the jury's deliberations? Is the "sanctity of the juryroom" less sacrosanct, and the introduction of impermissible information to be winked at, if the trial judge could have agreed as a fact finder with the jury's tainted verdict? Respectfully, this cannot possibly be the standard for constitutional analysis in these circumstances.

Fed.R.Evid. 606(b) is merely a codification of pre-existing common law: *United States v. Eagle,* 539 F.2d 1166, 1170 (8th Cir. 1976), *cert. denied,* 429 U.S. 1110, 97 S.Ct. 1146, 51 L.Ed. 2d 563 (1977); *Smith v. Brewer,* 444 F.Supp. 482, 489 N.7 (S.D.Iowa 1978). The Notes of the Advisory Committee, with respect to Fed.R.Evid. 606, point out that "substantial authority . . . allows outsiders to testify as to occurrences both inside and out [of the juryroom room]," citing 8 *Wigmore on Evidence* §2354 (McNaughton Rev. 1961). Further, as to testimony by jurors concerning contacts with Court Officers, the Notes are unequivocal:

> "The policy does not, however, foreclose testimony by jurors as to prejudicial extraneous information or influences injected into or brought to bear upon the deliberative process. *Thus a juror is recognized as competent to testify to statements by the bailiff* or the introduction of a prejudicial newspaper account into the jury room (citing authority).
>
> . . . *Allowing them to testify as to matters other than their own inner reactions involves no particular hazard to the values sought to be protected.* The Rule is based upon this conclusion." (Emphasis added).

It is, therefore, immediately apparent that the court had *no* discretion on the basis of Fed.R.Evid. 606 (or on any

other basis for that matter) to refuse to allow plaintiffs in this hearing to examine Court Security Officers themselves concerning their contacts with the jurors and concerning influences brought to bear upon the jury or extraneous information passed to the jury or members thereof. The court had no discretion to refuse to inquire as to the source of each piece of extraneous information. The court, then, committed plain error in thus "foreclosing" the testimony at the subject hearing. [See also *Mattox v. United States,* 146 U.S. 140, 13 S.Ct. 50, 53, 36 L.Ed. 917 (1892)].

Fed.R.Evid. 606 has been unevenly applied by the courts, but one theme is consistent: where the court becomes informed of the presence of extraneous information in the juryroom or of outside contacts with jurors, either a new trial will directly result or, at the very least, a *full* hearing will ensue. As noted by the court in *Government of the Virgin Islands v. Gereau,* 523 F.2d 140 (3rd Cir. 1975) *cert. denied,* 424 U.S. 917, 96 S.Ct. 1119, 47 L.Ed. 2d 323 (1976), "Courts applying the rule [606] were, however, early aware that any flat prohibition against receiving such testimony contravened another public policy: that of 'redressing the injury of the private litigant' where a verdict was reached by a jury not impartial." (citing authority). 523 F.2d at 148. See also *Re Beverly Hills Fire Litigation,* 695 F.2d 207 at 213 (6th Cir. 1982). As noted in *Turner v. Louisiana,* 379 U.S. 466, 85 S.Ct. 546, 549, 13 L.Ed. 2d 424 (1965), "The requirement that a jury's verdict 'must be based upon the evidence developed at the trial' goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury."

Constitutional standards concerning rights to a fair trial before an impartial jury are equally applicable in criminal or civil matters: *Port Terminal & Warehousing Company v. John S. James Co.,* 92 F.R.D. 100, 105, n.2 (S.D.Ga. 1981). As stated in *King-Size Publications, Inc. v. American*

News Company, 194 F.Supp. 109 at 110 (D.N.J.) *cert. denied,* 368 U.S. 920, 82 S.Ct. 242, 7 L.Ed. 2d 136 (1961):

> . . . [A] fair and impartial jury is an essential element of every trial. And that means that *every* juror must be of the type qualifying as fair and impartial. Time after time the courts have stressed the indefectibility of this requirement. And since the principles of justice are universal, in spite of the fact that in criminal cases human liberty and life may be at stake, the same requisites of proper administration of justice must exist in principle for all legal proceedings, civil or criminal. Therefore the same high standards for jurors must be adhered to in civil litigation as prevail in criminal trials.

In *United States v. Howard,* 506 F.2d 865 (5th Cir. 1975), the court confirmed that the fact of extraneous information being present in the juryroom entitled the defendant to a full hearing to determine if there was any reasonable possibility of resultant prejudice:

> "Modern day trials are factually presented in open Court before the iron curtain descends upon the jury room. We cannot tolerate prejudicial factual intrusion into that sanctum lest our Courts return to darker days of our jurisprudential history. The dagger of hidden evidence must not be taken from its scabbard for the first time in the jury room to wound the defendant; and *unless its piercing effect is only skin deep and without prejudice to the anatomy of the trial, we must apply a constitutional salve.*" 506 F.2d at 866. (Emphasis added).

The court in *Re Beverly Hills Fire Litigation, supra,* spoke even more expansively of this policy:

> "Our circuit has recognized that such an error can rarely be viewed as harmless. The jury's receipt of such extraneous information 'requires that the verdict be set

> aside, unless entirely devoid of any proven influence or the probability' of such influence upon the jury's deliberations or verdict. (citing authority) . . . While influence on a single juror may be enough to necessitate reversal and remand (citing authority), the error is particularly grievous because a unanimous verdict was required and the juror communicated his findings to other jurors. We conclude that the controlling law permits no alternative to reversal." 695 F.2d at 215.

See also, *Parker v. Gladden,* 385 U.S. 363, 87 S.Ct. 468, 471, 17 L.Ed. 2d 420 (1966); *United States v. Castello,* 526 F.Supp. 847, 849 (W.D.Tex. 1981) (Once a juror has breached his duty by infecting the jury's deliberations with extrinsic material, a new trial will be warranted if there is a reasonable possibility of resulting prejudice therefrom; and where a breach of the juror's duty is shown, there is a rebuttable presumption of prejudice which shifts the burden of proof on the issue of a new trial to the other party.)

That standard applies equally to evidence of communications between court personnel and jurors regarding matters pertaining to the verdict: *Government of the Virgin Islands v. Gereau,* 523 F.2d 140 at 150, 153-154 (3d Cir. 1975) ("presumptively prejudicial" establishes "prima facie prejudice").

In other words, both the policy of avoiding harassment of the jury by asking questions prying into their actual mental processes in the deliberations *and* the policy of protecting the sanctity of the system itself by requiring that the verdict be based on the evidence from the witness stand, will be served by a rule providing that once information exists of fraternization between court personnel and jurors, or of extraneous prejudicial information having been introduced to the juryroom, *or* of the withholding from the court of juror complaints to just that effect, the burden shifts to

the verdict winner to disprove such information or influences or cover-up. That Rule must also take cognizance of the *use* of the extraneous information in a scheme of coercion in the juryroom, in determining the question of prejudice. The focus will remain on the evidence itself, so that neither side will be in a position to harass jury members about the actual effect of this information on their *thinking* as they reached their verdict.

In *Re Beverly Hills Fire Litigation, supra,* the trial lasted eleven weeks. While the jury was deliberating, a juror conducted a homemade test of opinion evidence adduced at trial, and reported his beliefs to six other members of the jury. After a verdict for the defendants was subsequently rendered, plaintiffs moved for a new trial. The lower court denied the motion, attempting to characterize this intrusion as harmless when viewed against the length of the trial and the amount of other evidence produced. The incident was thus characterized (as has been done by the trial judge here) as "of minor consequences" and "not a sufficient intrusion upon the deliberative process as to require the setting aside of the jury verdict." (695 F.2d at 212). The Court of Appeals disagreed and reversed: 695 F.2d at 213. It noted that "Whatever the juror's motives, however, the potential for prejudice inherent in an out-of-court experiment in this case remains." *Id.,* at 213.

In *Remmer v. United States,* 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954), the court was presented with post-trial evidence of private communication by an unnamed third person to a juror during trial. Counsel for the party against whom the verdict was eventually rendered would have moved for a mistrial *at that earlier stage,* had the information of the contact been disclosed when it was made. The court found such circumstances "presumptively prejudicial" and held that in such circumstances the burden rests heavily upon the Government to establish, after notice

to and a hearing of the defendant, that such prejudice actually did *not* arise. *Id.*, at 451.

Here, a juror passed a complaint to a Court Security Officer well *before* the verdict was reached. She complained of fraternization between court personnel and a juror. She complained that the juror had then introduced extraneous information into the juryroom which, the complaining juror deduced, must have come from the Court Security Officer. She complained *then* that those circumstances were causing real problems with the jury process.

Internal procedures required that such a complaint be taken to the court *right then* by the United States Marshal. Had those procedures been followed, rather than violated, the inquiry would have been made, and a mistrial or other appropriate relief or protection would have been fashioned. Fed.R.Evid. 606 only applies to post-verdict problems. Where, as here (having limited the inquiry by operation of Rule 606), the record discloses the kind of problems that existed — pre-verdict — Rule 606 has no further application and the balance weighs in favor of protecting the public trust in the system itself.

It is also to be noted that in allowing the evidence (barred by the lower court here) to determine the issue of prejudice, those courts found it totally appropriate to inquire as to *whether* the extraneous information or contact had an influence, even though Fed.R.Evid. 606 stopped inquiry beyond that question, as to the precise *weight* given the information in the juror's mind. In *Re Beverly Hills Fire Litigation,* the court, in finding a presumption of prejudice, relied in part on a letter from a juror stating that she felt she had been influenced by the extraneous information at issue there. 695 F.2d at 215. In *Parker v. Gladden, supra,* the trial court hearing had apparently involved the type of examination here, and the court took note of testimony by one

juror, on recall, that she "must" have been influenced. 87 S.Ct. 473, n.3.

Here the lower court failed to shift the burden as required, and failed to factor the shifted burden into either the type of hearing required in such circumstances, or into its evaluation of the evidence. The Fifth Circuit, in its effort to avoid another long trial, hid behind the concept that a trial judge is given leeway in determining what type of hearing to hold, in avoiding a real due process examination of what actually happened here. The Court of Appeals nevertheless *did* admit, at least that, "the line between consideration of facts not received in evidence and extraneous influence is uncertain at the margins." (Opinion of the Court of Appeals at A-25.)

REASONS FOR GRANTING THE WRIT
CONCLUSION

The trial court, by its conduct, and the Court of Appeals, rewarded the defendants with a confirmation of their success experience gained from a jury tainted by impermissible outside fraternization with Court Security Officers, through introduction of impermissible extraneous information to the juryroom, and through coercion by jurors of others on the jury, and through the apparent cover-up by the C.S.O.'s/Marshals of juror complaints of misconduct in the juryroom. The court winked at such frightening facts, and, in effect, suppressed evidence rather than acting to ensure a fair trial. Jurors who *wanted to air their complaints* of this harassment were prevented from doing so by a court which explained that it was only acting to "protect" them from having to submit to inquiry on just that set of complaints which they *sought* to discuss.

Fed.R.Evid. 606 is not and cannot possibly be tortured to be a basis for barring access by counsel to evidence of an investigation of improper contacts by court personnel with jurors during their jury service in the case. There is no authority whatsoever to justify a bar to examination by counsel of court personnel, placed by complaining jury members as having fraternized with a juror who then poisoned the deliberative process with extraneous information which was extremely sensitive and of the type which would be presumptively prejudicial. The remaining body of case law is, at least, in conflict; the Court of Appeals has admitted that the line to be followed is "uncertain." In such circumstances, a writ of certiorari is entirely appropriate: *Johnson v. Bennett,* 393 U.S. 253, 89 S.Ct. 436, 21 L.Ed. 2d 415 (1968); *F.T.C. v. Flotill Products, Inc.,* 389 U.S. 179, 88 S.Ct. 401, 19 L.Ed. 2d 398 (1967); *Mitchell v. Robert De Mario Jewelry, Inc.,* 361 U.S. 288, 80 S.Ct. 332, 4 L.Ed. 2d 323 (1960); *Marshall v. United States,* 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed. 2d 1250 (1959).

WHEREFORE, movants, plaintiffs, request that the Court issue a Writ of Certiorari to hear this matter and to articulate the standards for the type of hearing to be afforded.

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By _____
Attorneys for Petitioners

Dated: June 22, 1989

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-5617
No. 88-5521

ROBERT J. BOLTON, ET AL.,

Petitioners,

VS.

TESORO PETROLEUM CORPORATION, ET AL.,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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APPENDIX A

ORDERS AND OPINIONS OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS SAN ANTONIO DIVISION

SA-82-CA-824

ROBERT J. BOLTON, ET AL.,

Petitioners,

vs.

TESORO PETROLEUM CORPORATION, ET AL.,

Defendants.

SA-82-CA-825

ROBERT J. BOLTON, ET AL.,

Plaintiff,

vs.

ROBERT V. WEST, ET AL.,

Defendants.

ORDER

On this day came on to be considered the motion of plaintiffs for a new trial, and the supplement thereto, and the defendants' responses thereto. In the original motion, plaintiffs base their request for a new trial upon: (1) improper personal attacks on plaintiffs' counsel in closing arguments, (2) this Court's allowing evidence concerning plaintiffs' insider trading while not allowing plaintiffs to introduce evidence of the state court case in rebuttal and (3) the jury's knowledge that Randall B. Murphy was actually

Richard B. Miller. The Court finds these allegations to be without merit, and they are overruled. In the supplement to the motion, plaintiffs make various assertions of jury misconduct, including the introduction of extraneous information into the jury room.

A district court has broad discretion in deciding whether to grant a new trial for juror misconduct, and also has discretion in the methods used to gather sufficient evidence to decide the issue. *Carson v. Polley,* 689 F.2d 562, 580 (5th Cir. 1982). The trial court may tailor the investigation so as to minimize the harm likely to result from invading the sanctity of the jury room, while recognizing the need for an adequate hearing of the misconduct allegation. *Martinez v. Food City, Inc.,* 658 F.2d 369, 374 (5th Cir. 1981). This Court has, therefore, chosen to interview the jurors individually in chambers outside of the presence of the parties and their attorneys. The Court also requested counsel for plaintiffs and defendants to prepare a list of witnesses they propose to call, as well as a proffer of their testimony. Having considered the proffer as made in the list and by plaintiffs' counsel at the hearing, the Court is convinced there is no need for the taking of further evidence.

Rule 606(b), Fed.R.Civ.P., provides that:

> "Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter

about which the juror would be precluded from testifying be received for these purposes."

It is clear that neither the Court nor the parties can examine and evaluate the thought-processes of the jurors during deliberations. Any matter or statement occurring during deliberations and any effect thereof cannot form the basis of post-trial inquiry or of a new trial. A juror can testify concerning whether extraneous prejudicial information was improperly brought to the jury's attention. *Rushen v. Spain,* 464 U.S. 114, 121 n. 5, 104 S.Ct. 453, 457 n. 5, 78 L.Ed.2d 267 (1983). *Maldonado v. Missouri Pacific Ry. Co.,* 798 F.2d 764, 770 (5th Cir. 1986), *cert. denied,* 107 S.Ct. 1571 (1987). But even as to such information, the juror cannot give evidence as to the effect such extraneous influence had on the minds of the jurors and their deliberations. *Mattox v. United States,* 146 U.S. 140, 149, 13 S.Ct. 50, 53, 36 L.Ed. 917 (1982). *United States v. Howard,* 506 F.2d 865, 869 (5th Cir. 1975).

Plaintiffs contend that jurors Mullins, the foreman, and Albrecht intimidated and threatened the other jurors, thus coercing them into rendering a verdict for defendants. Intimidation and harassment, and other intrajury influences on the verdict fall within the general rule proscribing evaluation of the jury's thought processes. *Government of Virgin Islands v. Gereau,* 523 F.2d 140, 149-150 (3rd Cir. 1975), *cert. denied,* 424 U.S. 917 (1976). *Smith v. Brewer,* 444 F.Supp. 482, 487 (S.D. Iowa), *affirmed,* 577 F.2d 466 (8th Cir.), *cert. denied,* 439 U.S. 967 (1978). *See, Shillcutt v. Gagnon,* 827 F.2d 1155, 1158 (7th Cir. 1987). *United States v. Ayarza-Garcia,* 819 F.2d 1043, 1051 (11th Cir. 1987). *United States v. Lamp,* 779 F.2d 1088, 1097 (5th Cir.), *cert. denied,* 106 S.Ct. 2255, 3283 (1986). *United States v. Badolato,* 710 F.2d 1509, 1515 (5th Cir. 1983). *United States v. Blackburn,* 446 F.2d 1089 (5th Cir. 1971), *cert. denied,* 404 U.S. 1017 (1972). Related to the intimidation claim are plaintiffs' assertions that Mullins, the court

security officers and the marshals failed to tell the Court of the concerns of some of the jurors about Mullins' conduct during deliberations. Assuming such failure occurred, it is of no consequence to this case and cannot merit a new trial. The conduct of the foreman in the jury room during deliberations constitutes an intrajury influence with which this Court cannot be concerned in a post-trial attack on the verdict.

Plaintiffs have also alleged that extraneous prejudicial information was introduced into the jury room. Initially, there exists a presumption of jury impartiality, and prejudice will not be presumed. *United States v. Winkle,* 587 F.2d 705, 714 (5th Cir. 1979). However, a presumption of prejudice arises when it is shown that contact with a juror occurred. *Remmer v. United States,* 347 U.S. 227, 229, 74 S.Ct. 450, 451, 98 L.Ed. 645 (1954). *United States v. Howard.* The trial court must determine: (1) what, if any, extraneous matter was disclosed in the jury room, and, if so, (2) whether there was a reasonable possibility that it was prejudicial. *United States v. Howard. United States v. Castello,* 526 F.Supp. 847, 849 (W.D. Tex. 1981). The trial court must be careful to preclude inquiry into any influence the alleged prejudical extrinsic matter had upon the jurors, and it must avoid examination concerning any other aspect of the jurors' mental processes. *United States v. Howard.* Based upon the objective demonstration of extrinsic factual matter disclosed in the jury room, the trial court must determine the reasonable possibility of prejudice. *Ibid*

Having interviewed the jurors, the Court is convinced that the only extraneous matter which was brought to the jury's attention concerned the institutionalization of Dr. West's first wife and brief settlement discussions between Mr. Rosen and Mr. Miller. Mullins mentioned this fact concerning Dr. West's first wife during the trial, and it was again raised during deliberations. Both facts were mentioned only briefly and, afterwards, Mullins directed the

other jurors that they could not be considered. The testimony of the jurors suggested that these facts were of little or no significance. Whether the information regarding Dr. West's first wife even constitutes extraneous information under Rule 606(b) is uncertain since the fact does not pertain to the merits of this case. In any event, the Court finds that there is no reasonable possibility that plaintiffs were prejudiced by the introduction of these facts.

The jurors, when asked about extraneous matters, also stated that several non-factual issues were discussed such as the existence of insurance coverage to pay any judgment against Tesoro, the impact in the community of a judgment against Tesoro, whether current shareholders would pay a judgment against Tesoro, whether plaintiffs would have to pay costs of trial in the event of a hung jury, and that plaintiffs would, if they prevailed, recover treble damages. The jurors' discussion of the likelihood of insurance coverage and its effect concerns intrajury matters and cannot impeach the verdict. *Farmers Cooperative Elevator Assoc. v. Strand,* 382 F.2d 224, 230 (8th Cir.), *cert. denied,* 389 U.S. 1014 (1967). This Court is of the opinion that the other issues similarly involve the internal functioning of the jury and are proscribed by Rule 606(b) as a basis for challenging the verdict. Though arguably improper topics of discussion, they do not amount to extraneous information. The only extraneous facts which the jury did consider was the matter of Dr. West's first wife and the settlement discussions, and, as noted above, the introduction of those facts did not prejudice plaintiffs. The evidence in this trial lasted for approximately five months, and a preponderance of that evidence did not favor plaintiffs, lessening any possibility of prejudice. *See, Port Terminal and Warehousing v. John S. James Co.,* 92 F.R.D. 100, 106 (S.D. Ga. 1981).

Plaintiffs argue that Rule 606(b) should not preclude examination into what would have happened had the problems in the jury room been made known to the Court prior to the verdict, as juror Broff attempted to do. The

Court disagrees. Rule 606(b) precludes post-verdict examination of intrajury matters, and the fact remains that this is a post-verdict proceeding. It would thwart the policy reasons behind the proscription to allow an investigation on that basis. Additionally, it would require too much speculation as to the action that would have been taken. While plaintiffs ask the Court to examine the issue as if it had been raised before the verdict, they base their complaints of jury misconduct to a large extent on what has happened and what has been said since the verdict. There is no way to know now exactly what complaints of jury misconduct would have been made then. Juror Broff's testimony about her conversation with the court security officer during deliberations indicated that she was only assuming wrongdoing. Finally, based upon what the Court now knows about the conduct in the jury room, there is no basis for a new trial, thus, the matter of the marshal's failure to bring any reports to the Court's attention is moot.

Plaintiffs have also argued that Mullins and Albrecht were biased in favor of defendants and committed to them from the beginning of the trial. Plaintiffs contend that defendants West, Bonner and Frost are members of the Board of Trustees at Southwest Research Institute, where Mullins' father has worked for 25 years and where Mullins' girlfriend recently was hired. They argue that once the evidence at trial showed the connection between defendants and the Institute, Mullins was obligated, but failed, to disclose these conflicts to the Court. A district court can receive testimony and grant a new trial if a juror's testimony relates to the concealment or giving of false information during voir dire. *Maldonado v. Missouri Pacific Ry. Co.* While thought processes of jurors are protected, a juror can testify concerning any mental bias in matters unrelated to the specific issues that the juror was called upon to decide. *Rushen v. Spain.* The proper time to discover such prejudices is when the jury is selected and peremptory challenges are available. *United States v. Duzac,* 622 F.2d 911, 913 (5th Cir. 1980).

A jury verdict cannot be disturbed merely because personal prejudices were not put aside during deliberations. *Ibid.* And the failure of a juror to disclose information at voir dire does not require a new trial in the absence of a showing of prejudice. *Vezina v. Theriot Marine Service, Inc.*, 554 F.2d 654, 656 (5th Cir. 1977).

Albrecht denied any bias in defendants' favor and no factual evidence to the contrary exists. Mullins also denied any predisposition to defendants and testified that he did not learn until after the verdict that three of the defendants are trustees at the Institute. His knowledge that his father was employed there and that his girlfriend had applied there for a job had, therefore, no bearing on this case. During trial, Dr. Robert West testified that in 1947 or 1948, he was offered a job at the Institute by Tom Slick, its founder. He decided instead to work for Slick in the oil and gas business, where he stayed until 1964 when he formed Tesoro. There was no mention of any connection since then between any defendant and the Institute. There has been no showing that Mullins withheld or falsified any information during voir dire, and Dr. West's association with the Institute's founder 23 years ago is too remote and tenuous to create any obligation on Mullins' part to reveal the present interests of his father and his girlfriend in the Institute.

Having heard the testimony of the jurors, the Court feels compelled to comment on what obviously were highly exaggerated and unfounded allegations of jury misconduct, the effect of which was magnified by the extensive media coverage. Such allegations are serious matters, necessitating the type of inquiry conducted here, and because they are so serious, they should not be made lightly. These jurors were accused of bias in favor of defendants, concealment of conflicts of interest, romantic involvement with court personnel, and considering extraneous prejudicial information in violation of this Court's instructions. Such accusations reflect not only on their integrity as jurors but also their personal lives. All of these claims are wholly unfounded. The

jurors patiently listened to the evidence without predisposition to one side or the other. The extraneous facts which were brought to their attention were extremely minor in the context of this lengthy and complicated case, were discussed only briefly, and did not prejudice plaintiffs. As Mullins stated, the claim of a romantic involvement between a court security officer and another juror was "preposterous".

As for the deliberations themselves, the consensus among the jurors was that foreman Mullins directed the jury's attention to the evidence and to the Court's charge, and away from discussion of other matters. The jury spent five months listening to the evidence (much longer than the parties, at the beginning, had represented the trial would take) and two weeks in deliberations. While jury duty is almost always an inconvenience, the sacrifice these jurors made was above and beyond the call of duty. They arrived at a unanimous verdict in the jury room and, after the verdict was read in open court, confirmed their decision.

The Court wishes to express to the jurors its regret that they were subjected to such accusations, and the necessity of the inquiry by the Court. They conducted themselves in an exemplary fashion, and performed an extraordinary task under the most difficult of circumstances. Despite what has happened, it is this Court's hope that they will not remember their experiences in this trial as unpleasant ones but with pride in the knowledge of a job well done and of the essential part they played in the functioning of the judicial system of the United States.

It is, therefore, ORDERED that plaintiffs' motion for new trial is DENIED.

SIGNED this 6th day of November, 1987.

/s/ H.F. GARCIA
United States District Judge

APPENDIX B

ORDERS AND OPINIONS OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 88-5521

In Re:
ROBERT J. BOLTON, ET AL.,
Petitioners.

On Petition for Writ of Mandamus to the United States District Court for the Western District of Texas

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Before GEE and JONES, *Circuit Judges.*

BY THE COURT:

IT IS ORDERED that the petition for writ of mandamus is DENIED.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Nos. 87-5617
88-5512
88-5534

ROBERT J. BOLTON, ET AL.,
Plaintiffs-Appellants,

vs.

TESORO PETROLEUM CORP., ET AL.,
Defendants-Appellees.

ROBERT J. BOLTON, ETC., ET AL.,
Plaintiffs-Appellants,

vs.

ROBERT V. WEST, ET AL.,
Defendants-Appellees.

Appeals from the United States District Court for the Western District of Texas

(April 24, 1989)

Before GEE, REAVLEY, and HIGGENBOTHAM, *Circuit Judges.*

HIGGINBOTHAM, *Circuit Judge:*

After more than five months of trial, including nearly three weeks of deliberations, a jury returned a defense verdict on all claims in this combined class action and derivative suit brought by disgruntled investors in Tesoro Petroleum Company. Appellants, asserting a variety of arguments, seek a second trial. We reject the request, affirming on all substantive issues, modifying only the district court's award of costs.

I. FACTUAL AND PROCEDURAL BACKGROUND

The record comes to us in eighteen boxes, including a 156 volume trial transcript. The relevant events, however, sort to three factual contexts, broadly stated.

A. *Foreign Payments and the Grand Jury Investigation*

Before the Foreign Corrupt Practices Act of 1977,[1] Tesoro Petroleum Company made "sensitive payments" designed to influence officials of foreign governments on matters of interest to the company. Tesoro's payments to foreign officials first came to light during an Internal Revenue Service investigation. The Securities and Exchange Commission also began an investigation, and Tesoro elected to participate in the SEC's "voluntary disclosure" program. In 1977, Tesoro's Board of Directors, created a special committee of independent, outside directors responsible for investigating the sensitive payments, recommending actions to be taken, and reporting to the SEC. The committee hired two Houston law firms as counsel, Fulbright & Jaworski and Vinson & Elkins, and the Fulbright firm conducted an extensive investigation concluded by its final report. The report discussed evidence of payments to officials or other questionable activities in six foreign countries. Acting on legal advice, the special committee disclosed certain payments in a Form 8-K filed with the SEC. The SEC then began a formal investigation, ending with a consent judgment requiring Tesoro to file a supplemental Form 8-K and enjoining future violations. The SEC referred the sensitive payments matter to the Justice Department, and a grand jury began an investigation in 1978. The grand jury also investigated whether Tesoro or any of its officers had defrauded the government or obstructed justice in connection with the various investigations.[2]

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1. *See* 15 U.S.C. §78dd-1,2.

2. The grand jury investigation is discussed in *In re Sealed Case*, 676 F.2d 793 (D.C. Cir. 1982).

In 1981, Tesoro's Board of Directors created another special committee, composed of four independent, outside directors. That committee hired Kirkland & Ellis as independent counsel and set about to discharge its responsibility to monitor the grand jury investigation and make any required disclosures. Tesoro had disclosed the pendency of the grand jury investigation when it began. In a January 25, 1982 proxy statement, the 1981 Special Committee, after referring to the Fulbright & Jaworski investigation, SEC investigation, and the Forms 8-K describing the investigations, disclosed the following:

> A Federal Grand Jury sitting in Washington, D.C. is currently conducting an inquiry into certain aspects of the matters involved in the Special Committee's and the SEC's investigations. The Grand Jury inquiry is continuing, and the Company is unable to predict at this time what the effect of such investigation, or the findings resulting therefrom, will be. The Company is cooperating fully in an effort to expedite the disposition of this matter.
>
> Dr. West participated in, or had knowledge of, most of the transactions covered by the Special Committee's and the SEC's investigations. Certain other members of the Board of Directors participated in, or had knowledge of, to varying degrees, some of such transactions.

The grand jury ended its investigation in 1984 without returning any indictments.

B. *The Diamond Shamrock Approach*

In August 1980, Diamond Shamrock Corporation informed Tesoro that it had acquired 4.5 percent of Tesoro's common stock. On August 20, an informal telephonic conference was held for all available Tesoro directors. After hearing advice from attorneys and financial advisors, the Board members unanimously resolved that Tesoro was not for sale and that they would resist offers not deemed to be in

the shareholders' best interests. Tesoro communicated its position to Diamond Shamrock that same day.

On August 21, Diamond Shamrock's Board of Directors authorized its Chairman to initiate a tender offer for Tesoro common stock not to exceed $38 per share. A week later, Diamond Shamrock informed Tesoro that it had abandoned plans to acquire more Tesoro stock. In the interim, Tesoro had sued Diamond Shamrock to block the takeover and the government of Trinidad and Tobago, majority partner in a Tesoro-Trinidad joint venture, announced its opposition to any acquisition of the company. The parties agree that this announcement caused Diamond Shamrock to lose interest in the takeover attempt. Appellants asserted at trial that the acts of the Trinidadian government were prompted by Tesoro.

C. *Reorganization Plans*

During the Diamond Shamrock episode, speculation carried Tesoro's stock up over $32 per share, but at its end prices dropped, at times falling below half of the previous highs. Tesoro considered reorganization. Lazard Freres & Co. developed the first plan for reorganization, describing it in a January 11, 1982 memorandum. The Lazard Freres plan envisioned that a public company would be spun off to shareholders, its assets consisting primarily of Tesoro's oilfield service businesses. Refinery and marketing assets would be sold for cash to a new private company owned by Lazard, outside investors, and Tesoro's management. Other assets would be liquidated.

In early January, trading in Tesoro stock increased, apparently responding to rumors of a reorganization. On January 25, the same day the proxy statement disclosed the grand jury matter, Tesoro issued the following press release:

> In response to the recent market activity in its stock, Tesoro Petroleum Corporation announced today that

> its management and investment bankers are considering several courses of action to alleviate the undervaluation of the company's stock in the market. Among the steps being considered are the distribution of certain of the company's operations to its shareholders and the sale of other company operations for cash which would be distributed to the shareholders. The announcement emphasized that there is no assurance that any of the actions being studied will be adopted by the company.

At that time, the Lazard Plan had not been presented to the entire Board of Directors.

The Board was informed about the Lazard Plan at its January 27 meeting. Since certain directors would potentially be investors in the new private company, the Board created another special committee of independent, outside directors, identical in membership to the committee reviewing grand jury disclosures. The committee was asked to review the Lazard Plan for fairness to shareholders and to consider other alternatives to increase the value of Tesoro stock. The parties differ over how close the Lazard Plan was to implementation at this point. Appellants point out that Lazard Freres had already found a lender interested in leading a syndicate of banks to finance the plan, as well as certain investors willing to purchase preferred stock in the private company. Appellees argue that financing for the private company was still contingent, and that the Lazard Plan faced other contingencies such as obtaining Board and shareholder approval and finding purchasers for Tesoro assets.

By mid-May, Tesoro decided not to pursue the Lazard Plan further. The parties dispute why. Appellants emphasize testimony that implementing the Lazard Plan would have required the company to make additional disclosures about the grand jury investigation. However, the same witness also identified three other "bullets" which made the plan unfeasible, including a contingent tax liability, claims

asserted by the Department of Energy based on alleged overcharges for regulated oil, and a California Public Utility Commission order threatening the abrogation of a profitable contract between Tesoro's Alaskan refinery and San Diego Gas & Electric Company. Two other members of the 1982 Special Committee testified that deterioration in the oil and gas industry contributed to the decision. Appellees emphasize that Lazard Freres determined independently to withdraw the Lazard Plan, and allegedly communicated this decision to Tesoro's CEO before the 1982 Special Committee made its report. Appellants believe that the leveraged buy out plan was stalled only temporarily, pointing to handwritten notes taken at a meeting which described the "going private part of plan" as "dead for [the] time being."

After the demise of the Lazard Plan, Tesoro quickly developed an alternative plan of reorganization. The new plan called for splitting Tesoro into two public companies, one running the oilfield services business, and the other operating the refining business. While this scheme resembled the Lazard Plan in some respects, it did not require the financing of a leveraged buy out. The two public companies plan was presented to the Board of Directors on May 26, 1982, and described in a press release the next day. But appellants saw this alternative plan as a sham designed to mask Tesoro's true intention, to repurchase Tesoro stock as the first step of a scheme to take the company private.

Tesoro eventually abandoned the two public companies plan and, on July 28, 1982, announced a "self-tender offer" for its own stock at $22 per share, substantially above the going market rate. Three investment banking firms gave opinions that the $22 price was fair to all Tesoro shareholders, and the tender offer was oversubscribed. But appellants saw the offer as a Tesoro effort to reduce outstanding shares and eliminate dissident shareholders to facilitate a later leveraged buy out. Appellees assert that the problems in the

oil and gas industry made any restructuring of Tesoro unfeasible, and that the stock repurchase was not considered at all until early July.

D. *Claims Asserted*

This appeal involves two separate lawsuits which were consolidated for trial. The class action was filed on October 1, 1982, soon after Tesoro's stock repurchase. The named class plaintiffs were Robert J. Bolton, George E. Meyer and Leo A. Walker, III. Mr. Meyer voluntarily withdrew as a named plaintiff a few months after suit was filed, though he remained a class member. The derivative action was filed by Bolton on October 7, 1982. Defendants in the two actions included Tesoro Petroleum and various individuals associated with the relevant events. Lazard Freres and one of its partners settled before trial, while two outside directors were voluntarily dismissed by the plaintiffs.

1. *Class Action Claims*

The district court certified four classes of investors:

1) The "Buyer Class" included all purchasers of Tesoro common or preferred stock from January 25, 1982 (date of grand jury disclosure) until suspension of trading in Tesoro stock on May 27, 1982 (press release announcing consideration of two public companies plan).

2) The "Seller Class" included all sellers of Tesoro common or preferred stock from after the suspension of trading on May 27, 1982 through September 30, 1982 (filing of lawsuit).

3) The "Proxy Class" included all record shareholders as of January 14, 1982 who were entitled to receive the January 25 proxy statement in connection with management's solicitation of proxies for the February 24, 1982 shareholder meeting.

4) The "Tender Class" included all who tendered shares of common stock or converted shares of convertible preferred stock pursuant to the July, 1982 tender offer.

There were two damage claims based on alleged violations of SEC Rule 10b-5.[3] First, the Buyer Class asserted injury from the allegedly inflated market price of Tesoro common stock and call options caused by material misrepresentations and omissions from January 25, 1982 to May 27, 1982. Second the Seller and Tender classes claimed injury from an alleged deflation of Tesoro's stock between May 27, 1982 and September 30, 1982, caused by the May 27, press release that misled investors regarding the defendants' true intentions.

The plaintiffs also asserted claims premised on the Racketeer Influenced and Corrupt Organizations Act,[4] alleging that the defendants conspired to conduct and maintain control of Tesoro through a pattern of racketeering activity. The Rule 10b-5 claims, state law commercial bribery, obstruction of justice, and wire and mail fraud were its predicate acts. RICO damages were premised on the alleged Rule 10b-5 violations and on an asserted loss of the "value of control" of Tesoro. Plaintiffs also requested equitable relief for the Proxy Class, including removal of certain directors, based on alleged violations of SEC Rule 14a-9,[5] and SEC Regulation S-K.[6]

2. *Derivative Claim*

Plaintiff Bolton asserted a derivative claim on behalf of Tesoro. He sought indemnification from responsible defendants for any liability of Tesoro in the class action. He

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3. 17 C.F.R. §240.10b-5.

4. Plaintiffs' asserted claims based on 18 U.S.C. §1962(b)-(d).

5. 17 C.F.R. §240.14a-9.

6. 17 C.F.R. §§229.402, 229.404.

also asserted injury to Tesoro based on the defendants' hostile reaction to the Diamond Shamrock takeover approach.

II. ARGUMENTS ON APPEAL

A. *Jury Instructions*

1. *Materiality*

Appellants object to the district court's instructions on the "materiality" of facts allegedly misrepresented or omitted for purposes of the claims under Rule 10b-5. The court's materiality instructions included the following paragraph:

> Preliminary negotiations or plans concerning mergers, reorganizations or other significant corporate transactions like a stock buy-back are not considered "material" facts requiring disclosures to the investing public unless and until there is a proposal or an agreement incorporating the fundamental terms of the transaction, such as price and structure. So long as discussions regarding such developments are preliminary, tentative, or contingent in nature, such information is not "material" as a matter of law and there is no duty to disclose it.

Appellants' present attack upon this instruction rests on *Basic, Inc. v. Levinson,*[7] decided after trial in this case. The Court concluded in *Basic* that an omitted fact is material when there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[8] The district court included much of the *Basic* language in its instruction on "materiality." However, the *Basic* Court rejected and the district court here insisted upon an "agreement-in-principle" test

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7. 108 S.Ct. 978 (1988).

8. *Id.* at 983 (quoting *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449, 96 S.Ct. 2126, 2132, 48 L.Ed.2d. 757 (1976)).

for determining the materiality of preliminary plans or negotiations.[9] Appellants argue that the charge thus trips on its explanation of the materiality of preliminary plans or negotiations.

A "formal objection is not necessary if the trial judge was fairly apprised of the nature of the objection."[10] Appellants objected to the charge "to the extent any charge [they] requested was not given by the Court." This is little more than a nod to Rule 51; it is not sufficient to inform the trial court of a perceived problem. Appellants also suggest that they objected to the materiality instructions in a conference with the district court's law clerk. Such communication with a law clerk may assist the court in its preparation of the charge. It is not a legally sufficient objection. Moreover, this "conference" with the law clerk was not included in the record on appeal. In sum, we find no adequate objection and without an objection, we will listen only to plain error.

As we will explain, we are persuaded that any error in the instruction challenged was likely harmless, but in any event was not the cause of injustice. The argument is that the charge's insistence that merger or reorganization plans did not become material until there was an agreement to the fundamental terms of the scheme prejudiced the claim that defendants wrongfully failed to disclose the "plan to go private through an LBO"; that the company's tender offer was a part of the "undisclosed plan to go private," that the plan existed in May of 1982, and that the district court's instruction prevented the jury from considering whether information regarding the tender offer should have been disclosed earlier.

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9. *Id.* at 986.

10. *Bass v. United States Department of Agriculture*, 737 F.2d 1408, 1413 (5th Cir. 1984) (citing *Williams v. Hennessey*, 328 F.2d 490, 491 (5th Cir. 1964)).

Despite its surface appeal the argument is deeply flawed. First, any error in the definition of materiality, specifically its insistence on an agreement in principle, had no bearing on the Buyer Class. This class asserted non-disclosures regarding the grand jury investigation. Appellants now suggest, although it is unclear that they made the argument at trial, that insisting on an agreement as the litmus of materiality foreclosed their argument that defendants ought to have disclosed the Lazard Plan in January 1982. How such a failure could have injured the *Buyer* Class is not explained. We are not persuaded that the claims of the Buyer Class suffered from the error in the charge.

We also find no prejudice to the Seller Class and Tender Class claims under Rule 10b-5. By insisting on an agreement in principle as a trigger to any obligation to disclose, the charge erroneously narrowed defendants' obligation to make any disclosure. But this error was not of consequence here. The theory of damages suffered by the Seller and Tender Classes did not depend on a failure to disclose, but rather rested on the assertion that the May 27, 1982 press release, announcing consideration of a two public companies plan, was a sham, a ploy to drive down the price of Tesoro stock, so that the tender offer could be made at less cost to the comany.[11] Indeed, the damage proof rested on this theory. A damage expert based his damage estimates for the Seller and Tender Classes on a comparison of actual stock prices from May 27 through September 30, and the stock prices which might have occurred had the company made the tender offer on May 27. In sum, the claim of the Seller and Tender Classes was that defendants fraudulently misstated the plan, and the charge correctly submitted that theory.

Immediately after the portion of the challenged materiality instructions, the district court instructed the jury that

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11. Appellants' relevant contentions, as set forth in the Pretrial Order, are reproduced in Appendix A to this opinion.

"any disclosure of such plans, even if not required, must be complete and accurate." Thus, if the jury believed appellants' theory that the May 27 press release was a sham, then the company's disclosure would not be "complete and accurate," and the district court's instructions would compel a finding that the company's omissions were material.

Finally, and relatedly, the theories advanced at trial by the Seller and Tender Classes did not rest on a contention that material planning short of an agreement in principal was wrongfully not disclosed. Rather they urged that Tesoro did have a fully developed plan not disclosed by Tesoro as part of its objective to drive down the price of the stock before effectuating its plan. Thus, insisting on an agreement in principle, while contrary to *Basic,* imposed no additional burden on the Seller and Tender Classes.

We do not review the abstract correctness of a charge. Rather we ask whether in the context of trial the jury was fairly and accurately instructed. Inaccurate statements that prove in retrospect to have been demonstrably irrelevant are just that — irrelevant and inconsequential errors — not unusual attendants to long and hard fought trials. In context, the failure to fully anticipate *Basic* proves to be just such an irrelevancy.

2. *Business Judgment Rule*

The derivative plaintiff also challenges the district court's instructions regarding the business judgment rule under Delaware law. As we understand it, the argument is that the district court should have conditioned the jury's application of the business judgment rule on a prior finding that the directors fulfilled their fiduciary duties to the corporation. The focus is upon one sentence from *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*[12] in which the Delaware Supreme Court stated that "[w]hile the business judgment rule may be applicable to the actions of corporate

12. 506 A.2d 173, 180 (Del. 1986).

directors responding to takeover threats, the principles upon which it is founded — care, loyalty and independence — must first be satisfied." The argument continues that the instructions on the business judgment rule as a whole misled the jury into believing that the directors' resistance to the Diamond Shamrock takeover attempt was conclusively presumed to be valid. The contention at trial was that defendants failed to exercise due care, failed to act on an informed basis, and resisted the takeover out of a desire to maintain their positions at Tesoro and prevent the company from cooperating fully in the grand jury investigation.

We find no error in the district court's instructions. The court began with a complete description of the directors' fiduciary duties. It then emphasized the fiduciary duties in a takeover situation:

> Where a corporation is approached by a third party, whether such party is already a shareholder or not, and such party desires to acquire the outstanding shares of the corporation, the director's fiduciary duties to the shareholders apply fully in determining what course of action to take. When a board opposes a takeover threat or when it implements anti-takeover measures there is a potential for conflict between the interests of the board and management on the one hand [and] the shareholders on the other. Accordingly in such a situation the directors must at all times act in good faith, on an informed basis and in the honest belief that their action is in the best interest of the company and its shareholders.

After describing the business judgment rule, the court instructed the jury that defendants could only rely on its protection if they first established that they "reasonably perceived a threat to the corporate policy and effectiveness of the company" from the takeover, and that the "response made was reasonable in relation to the threat they perceived." In discussing the first prong of this test, the court

stated that the directors could "satisfy their burden on this issue by showing that they acted in good faith and after reasonable investigation." The judge further emphasized that "[t]here can be no self-dealing, nor can the directors in responding to a possible takeover action bad faith, fraudulently, or to protect or further the interests of all or some of the directors." While instructing that the jury could only find the directors' decision uninformed if the directors were grossly negligent, the court also stated that "the methods and procedures they follow in gathering and analyzing information cannot be restricted in scope, shallow in execution, a mere pretext, half-hearted, or a sham."

These portions of the charge amply placed on the directors the burden of showing that they met their fiduciary duties before enjoying the protection of the business judgment rule. It is plain that the jury instructions did not establish a conclusive presumption in favor of the directors' acts. In short we are not persuaded that the district court misstated the responsibilities of directors under Delaware law in responding to a takeover threat.

B. *Jury Tampering*

Appellants argue that the district court abused its discretion in its handling of their charges of jury tampering raised in their motion for new trial. It is true that one of the court security personnel assigned to the case, Finton Stewart, was convicted after offering to sell the appellants information that the jury had been compromised. Nonetheless, we find no abuse of discretion.

In response to questions by appellants' counsel during a transcribed interview given after Stewart's arrest, Stewart indicated that a juror had been seen several times speaking with one of the United States Marshals. Stewart had also been told that the two were observed together on one occasion outside the courthouse. Stewart did not know the substance of their conversations. Stewart also related an incident in which another of the jurors had complained

about extraneous information in the jury room which had not been presented during trial. Though court security personnel are normally required to report such matters to the judge, no such report was made of this incident.

The district court interviewed each of the jury members *in camera*. Mindful of the limitations on juror testimony imposed by F.R. Evid. 606(b), the court carefully framed its questions to limit its inquiry into what extraneous information had been discussed by the jury and whether court personnel had attempted to influence the jurors. The court later gave appellants the opportunity to offer evidence of jury tampering, but refused to allow a "fishing expedition" pursued through cross-examination of court security officers.

How best to gather information regarding alleged jury misconduct is a matter of trial court discretion.[13] The judge's questioning reflected a careful attempt to draw the balance required by Rule 606(b), inquiring into objective events that might constitute extraneous influences on the jury, while avoiding any examination of the jury's subjective deliberation process.[14]

The district court also has broad discretion in determining whether to grant the motion for new trial based on jury misconduct.[15] The district court found no evidence that any jurors were biased toward the defendants. He found that only two pieces of extraneous information entered the jury room. First, the jurors discussed the fact that a defendant's wife had been treated for mental illness in an institution. Second, one juror reported overhearing a settlement discussion between two of the opposing attorneys. The district court found that these matters were mentioned only briefly, and afterwards the foreman instructed that they

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13. *Carson v. Poley*, 689 F.2d 562, 580 (5th Cir. 1982); *Martinez v. Food City, Inc.*, 658 F.2d 369, 372 (5th Cir. Unit A Oct. 1981).

14. *See Martinez*, 658 F.2d at 373.

15. *Carson*, 689 F.2d at 580.

could not be considered. The district court concluded, and we agree, that under the circumstances there was no reasonable possibility that this information prejudiced the appellants.

The jurors also mentioned other items discussed in the jury room that arguably went beyond the evidence presented at trial. These included such matters as the existence of insurance to pay any judgment, the effect of a verdict on the local economy, the assessment of trial costs in case of a hung jury, and the trebling of damages under RICO. But again, discussion was brief and the jury foreman directed the jurors to proper subjects of consideration.

The district court believed inquiry into these matters was foreclosed by Rule 606(b) as an invasion of the jury's deliberation process. We cannot say that the district court abused its discretion in this judgment, although admittedly the line between consideration of facts not received in evidence and extraneous influence is uncertain at the margins. To the extent the mention of these subjects is considered extraneous information within the exception to Rule 606(b), we find no reasonable possibility of prejudice to the appellants, given the instruction by the court that deliberations were to be confined to the evidence at trial and the credited testimony of the jury foreman that he reminded the jury of its duty to confine itself to the evidence.

C. *Advice of Counsel*

Appellants contend that the district court erred in allowing reliance on advice of counsel as a defense, when the court had denied discovery of certain information concerning advice given by counsel. Appellants sought discovery of documents relating to advice given by the law firm of Kirkland & Ellis to the 1981 and 1982 Special Committees. After brief *in camera* review of the documents submitted by appellees, the district court allowed access to all material relating to the 1982 Special Committee, rejecting appellees' claim that the documents were protected by attorney-client

privilege. The court did protect documents relating to the 1981 Special Committee, finding attorney-client and work product privileges, and expressing concern for grand jury secrecy. Nevertheless, the court allowed discovery of documents jointly considered by the two committees.

Appellants complain that they could not test the foundations of the advice given by Kirkland & Ellis to the 1981 Special Committee. They argue that they were prevented from exploring "the basis for, grounds of, and reliability of the advice received from counsel." However, they do not challenge appellees' right to rely on an advice of counsel defense with respect to disclosures authorized by the 1982 Special Committee. Nor do appellants take exception to the correctness of the instruction regarding advice of counsel. In essence, then, appellants have only the argument that the jury instruction on advice of counsel should have been confined to the 1982 Special Committee. The district court's error, if any, was in failing to tailor the advice of counsel instruction to prevent its application to claims relating to the 1981 Special Committee. But appellants did not ask the district court to narrow the instruction to 1982. Rather, they objected to the advice of counsel instruction "in its entirety," arguing that "we don't believe it would be appropriate under any circumstances to give that instruction here," an objection properly rejected by the district court. For whatever reason, appellants never modified their "all or nothing" stance in objecting to the advice of counsel instruction.

We do not suggest any "error" in counsel's electing not to draw distinctions between the treatment the jury might give to the 1981 and 1982 advice to the Special Committee. We can surmise several plausible and rational sound trial judgments behind the elected course. Such rationality only reinforces our unusual resolve to confine our task as an appellate court to considering the correctness of decisions made by the trial court. Stated another way, there is no injustice or technicality here. Trials abound with tactical choices and injustice is more often the companion of our

failure to accept them and allow shifts in position from trial to appeal. Appellants knew that the advice of counsel defense was proper with respect to advice given in 1982, since they drew the distinction themselves in a footnote to their pretrial motion on this issue, admitting that they did not seek to bar an advice of counsel defense "where plaintiffs have had opportunity for full discovery regarding such advice." Nevertheless, after the events of trial, appellants sought only the elimination of any such defense from the charge. We will not allow appellants to return on appeal to their pretrial position, having abandoned that position in objecting to the jury instructions.

D. *Attacks on Counsel*

Appellants argue that passion and prejudice infected the verdict, an argument that faces the practical difficulty that the jury deliberated for three weeks. In appellants' view, the jury was inflamed by personal attacks made on their lead counsel in appellees' opening and closing arguments. Appellants also focus on what they characterize as "us-against-them" arguments, allegedly designed to prejudice the jury against appellants' Philadelphia counsel. Appellants objected to the former type of argument, but made no objection to the latter. Appellants did not ask for a mistrial before jury deliberations. Instead, they requested and received a corrective instruction, in which the court emphasized the inappropriateness of attacks by one attorney on another and charged the jury not to consider such attacks for any purpose. We have noted before that a district judge occupies the best position from which to observe how an attorney's conduct impacts the jury.[16] The decision not to grant a new trial is reviewed under an abuse of discretion standard. Further, the appellants' failure to request a

16. *Maldonado v. Missouri Pacific Ry. Co.*, 798 F.2d 764, 771 (5th Cir. 1986) (quoting *South Hampton Co. v. Stinnes Corp.*, 733 F.2d 1108, 1123 (5th Cir. 1984)), *cert. denied*, 107 S.Ct. 1571 (1987).

mistrial before the verdict, in essence choosing to gamble on the jury verdict, weighs against a new trial.[17] In these circumstances, we defer to the district court's decision that a new trial was not warranted.

E. *Insider Trading*

Throughout the trial, appellees over objection sought to show that Mr. Walker, one of the class representatives, and Mr. Meyer, who withdrew as a named plaintiff prior to trial, but remained a class member, had traded in Tesoro stock based on inside information. We find no abuse of discretion. The charges of insider trading related to reliance, an essential element of appellants' securities fraud claim.

Appellants also challenge the exclusion of evidence regarding a state court lawsuit filed by Tesoro. The lawsuit originally raised claims of insider trading against Meyer and Walker. Tesoro voluntarily dismissed the insider trading charges before trial in that case. Appellants claim that the district court should have permitted evidence regarding the state court suit to show that Tesoro had been unable to prove its charges of insider trading. We find no abuse of discretion in the district court's ruling. Voluntary dismissal of a suit can occur for a variety of reasons. The relevance of the state court action was, thus, marginal, and the district court could properly exclude the evidence under F.R. Evid. 403.

F. *President Ford*

Appellants complain that the district court allowed the jury to view a videotaped deposition of former President Ford, a Tesoro director. The argument is that President Ford had no personal knowledge of the events forming the basis for the lawsuit, and that his evidence consisted primarily of favorable character evidence offered on behalf of Tesoro's CEO. Appellants filed a motion in limine, seeking exclusion of references to President Ford, other than the fact that he is a current director, without first obtaining a ruling

17. *Id.*

from the bench. However, "an objection is required to preserve error in the admission of testimony or the allowance of cross-examination even when a party has unsuccessfully moved in limine to suppress that testimony or cross-examination."[18] Other than the motion in limine, we find no place in the record where appellants objected to President Ford's testimony on the ground that it constituted character evidence inadmissible under F.R. Evid. 404(a).[19]

Admission of President Ford's testimony regarding his high esteem for Tesoro's CEO was not plain error. Rule 404(a)(1) allows evidence of relevant character traits of an "accused" individual. Such evidence can be admissible in a civil trial raising quasi-criminal allegations against a defendant.[20] In this case, appellants promised during opening argument to show the jury the "sinister dark side of [the CEO]." During trial, Dr. West was accused of obstructing justice, defrauding the government, perjury, and criminal bribery. It was not "plain error" to admit character evidence on his behalf.

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18. *Collins v. Wayne Corp.*, 621 F.2d 777, 785 (5th Cir. 1980); *see also Wilson v. Waggener*, 837 F.2d 220, 222 (5th Cir. 1988).

19. Appellants only made two objections during the playing of President Ford's deposition, one of which was sustained. The other objection related to two questions regarding the current Board of Tesoro. Appellants objected that the questions were leading and suggestive and that the testimony elicited was irrelevant to the issues in the lawsuit. They did not object to the testimony as being inadmissible character evidence concerning Tesoro's CEO. Nor do we find such an objection in the document entitled Plaintiffs' Objections and Cross Designations Re: Designation of Gerald R. Ford. That document objected generally to introduction of a videotaped deposition, but not to having President Ford's testimony read into the record. It also listed specific objections to portions of the testimony, but did not include the complaint raised here. Further, it raised no objection to the specific portions of the Ford deposition included by appellants in the record excerpts they filed with this court as examples of the objectionable testimony.

20. *Carson v. Polley*, 689 F.2d 562, 575-76 (5th Cir. 1982).

Further, President Ford's testimony related to other issues in the trial. He testified concerning the functions of a board of directors and the role of special committees, valuable background for the jury. President Ford was also able to inform the jury of the business and regulatory climate before passage of the post-Watergate Foreign Corrupt Practices Act, when Tesoro made "sensitive payments" to foreign governments.

G. *Costs*

We agree with the appellants that the district court abused its discretion in awarding the cost of an original and eleven copies of the daily trial transcript. Daily transcript costs may be awarded only upon a finding "that they were not 'obtained primarily for the convenience' of the parties but were 'necessarily obtained for use in this case.' "[21] The district court so found. He reasoned that the complexity and length of the trial, combined with the fact that Tesoro and the nine individual defendants regularly had ten to twelve attorneys in the courtroom, made it necessary to obtain an original and eleven copies of the daily transcript.

In *In re Nissan Antitrust Litigation,*[22] a complicated antitrust case involving a five-week trial, we reversed an award of costs for a daily trial transcript as an abuse of discretion. In this case, the district court divided the defendants into four groups and would only allow one attorney from each group to address any particular issue or cross-examine any particular witness. Thus, while we respect the district court's finding that a daily transcript was necessary, we cannot approve an award of costs for more than four total copies of the daily transcript. Anything more was solely

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21. *Studiengesellschaft Kohle v. Eastman Kodak Co.*, 713 F.2d 128, 133 (5th Cir. 1983) (quoting *Brumley Estate v. Iowa Beef Processors, Inc.*, 704 F.2d 1362, 1363 (5th Cir. 1983)).

22. 577 F.2d 910, 918 (5th Cir. 1978), *cert. denied sub nom. PDQ, Inc. v. Nissan Motor Corp.*, 439 U.S. 1072 (1979).

for the convenience of the parties. We find no abuse of discretion with regard to the other costs awarded by the district court.

III. CONCLUSION

This was a hard fought lengthy jury trial with able lawyers. Appellants received a fair trial and as we see the dispute — it's over. We affirm the judgment below. We also affirm the award of costs except we modify the award of costs for daily copy to include only an original and three extra copies of the daily trial transcript.

AFFIRMED in part, MODIFIED in part.

Appendix A

Pretrial Order, Plaintiffs' Contentions (excerpt):

By May 16, 1982 . . . the 1982 Special Committee decided that the plan to go private could not be implemented because the company would have to disclose the allegations of wrongdoing by Tesoro and West, which would not only expose Tesoro's foreign assets to a significant risk of loss, but would be personally "painful" to West.

Admiral Zumwalt knew West was firmly entrenched in implementing the plan to go private, but the 1982 Special Committee decided it would be best for the company for West himself to withdraw it. Plaintiff's evidence will show that while the plan to go private was ostensibly withdrawn, West only delayed his ultimate goal. He decided instead to accomplish that objective in a series of steps, the first of which would be a repurchase of stock. A self-tender of Tesoro stock had been discussed earlier, was always a viable option, and could be funded from money readily available. In light of the disclosure problems, though, West knew he could not announce that the tender was the first step in a going private transaction, and he did not. A repurchase, though, would decrease the number of outstanding shares, increase management's ownership percentage, test the water, for the ultimate going private transaction and make a complete tender easier to do later.

Plaintiffs will show, however, that defendants knew the trading price of Tesoro's stock too high [sic] in May because the market was anticipating a reorganization plan from the 1982 Special Committee. West and the others wanted to reduce the price so they could do the tender offer at a much price [sic] and to keep down the trading price of the stock after the tender. Thus, West and management decided to drive down the price of Tesoro stock in advance of the tender, announce a self-tender for ⅓ of the outstanding stock with the money readily available, and then use the proceeds from the later sale of the interests in Trinidad-Tesoro to

make further self-tenders. In the interim, it was hoped the grand jury investigation would end, which would permit management to announce it was going private and buy in the remaining stock.

To drive down the price of the stock, West and management decided to announce the so-called two company plan, which was a sham. It was not economically viable, nor could it be implemented without adverse disclosures until the grand jury investigation was favorably resolved. Between May 16 and 26, West, Bloyd and Stewart, who knew the true facts, also represented in public statements that the 1982 Special Committee was still considering reorganization plans and had not yet reached any decision. They drafted the May 27, 1982 press release to make it appear as if it was the recommendation of the 1982 Special Committee. Thereafter, they proceeded to complete the tender at the very same price they had characterized as undervalued just six months earlier.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-5617
88-5512
88-5534

D.C. Docket No. SA-82-CA-824 and
SA-82-CA-825

ROBERT J. BOLTON, ET AL.,
Plaintiffs-Appellants,

VS.

TESORO PETROLEUM CORP., ET AL.,
Defendants-Appellees.

ROBERT J. BOLTON, ETC., ET AL.,
Plaintiffs-Appellants,

VS.

ROBERT V. WEST, ET AL.,
Defendants-Appellees.

Appeals from the United States District Court for the Western District of Texas

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Before GEE, REAVLEY, and HIGGINBOTHAM, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgments of the District Court in this cause as modified are affirmed in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that each party bear its own costs on appeal.

April 24, 1989

Supreme Court, U.S.
FILED
JUL 21 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-2096

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT J. BOLTON, *et al.*,

Petitioners,

VS.

TESORO PETROLEUM CORPORATION, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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Counsel for Respondents

QUESTIONS PRESENTED

1. Whether the district court abused its discretion in the manner and extent of its investigation into unsupported allegations of jury misconduct.

2. Whether the fact findings of the district court and the court of appeals—that there was no reasonable possibility of prejudice to petitioners by virtue of the extraneous facts mentioned during jury deliberations—are clearly erroneous.

3. Whether the district court abused its discretion in denying petitioners' motion for new trial based on alleged jury misconduct.

LIST OF PARTIES

Robert J. Bolton
Leo A. Walker, III
Members of the Class Certified by the District Court:

(1) All purchasers of common and preferred stock and call options in Tesoro Petroleum Corporation ("Tesoro") from January 25, 1982, until the suspension of trading on May 27, 1982;

(2) All sellers of Tesoro common and preferred stock from the resumption of trading on May 27, 1982, through September 30, 1982;

(3) All record shareholders of Tesoro as of January 14, 1982, who were entitled to receive the proxy statement dated January 25, 1982, in connection with management's solicitation of proxies for the February 24, 1982 meeting of shareholders; and

(4) All Tesoro shareholders who tendered stock pursuant to the self-tender offer, or stock repurchase, announced by Tesoro on July 29, 1982.

Tesoro Petroleum Corporation
Robert V. West, Jr.
M. Richard Stewart
Z. D. Bonner
Peter M. Detwiler
Charles Wohlstetter
L. Robert Fullem
Richard E. Deems
Thomas C. Frost, Jr.
John McKetta, Jr.
Arthur Spitzer

Subsidiaries and Affiliates of Tesoro Petroleum Corp. (other than wholly-owned subsidiaries):

Sabinall Insurance Company, Limited
Interior Fuels Company

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No. 88-2096

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT J. BOLTON, *et al.*,

Petitioners,

VS.

TESORO PETROLEUM CORPORATION, *et al.*,

Respondents.

Respondents request that this Court deny the petition for writ of certiorari seeking review of the opinion of the Fifth Circuit in this case. That opinion is reported at 871 F.2d 1266 (1989).

STATEMENT OF THE CASE

The trial of this case lasted five months. It involved allegations that respondents had violated the securities laws on a systematic and continuous basis, had committed various federal and state crimes, had engaged in multiple violations of the Racketeer Influenced and Corrupt Organizations Act, and had violated fiduciary duties of every kind and description. The district court's charge covers over seventy-five pages of transcript, and its interrogatories to the jury included 158 separate answer blanks. The jury answered every question favorably to respondents after nearly three weeks of deliberations, during which it never reported an impasse or a deadlock. The jurors were individually polled, and each affirmed the verdict as his or her own in open court.

Judgment on the jury verdict was entered July 28, 1987. Nearly three months later, petitioners filed a "Supplement to Motion for New Trial" seeking for the first time to overturn the verdict and judgment on grounds of alleged jury misconduct. That pleading, as the district court found, contained "highly exaggerated and unfounded allegations" [*P. App.* A7];[1] indeed, like petitioners' subsequent briefing in the court of appeals and this Court, the supplemental new trial motion presented as fact hearsay and gossip drawn almost exclusively from sensationalist newspaper reports.[2] It later became apparent that, in violation of a court order prohibiting the

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[1] The petition is cited in this brief in opposition as "*Pet.*"; the appendix to the petition as "*P. App.*"; and the appendix to respondents' brief in opposition as "*R. App.*"

[2] The second paragraph of the "Argument" section in the petition for writ of certiorari [*Pet.* 4-5], for example, where petitioners purport to describe the jury deliberations, contains at least seven representations that are either demonstrably false or unsupported by any evidence in the record. First, there is no record evidence that the "jury became split, four to two, for plaintiffs." Second, it is absolutely false to represent that the jury reported an "impasse" to the Court. It never did so. The jury did send out a note asking for clarification on the unanimity instruction and inquiring whether one juror could hang an entire jury, but at no time did the jurors say that they were deadlocked or at an impasse in their deliberations. Third, there is no evidence that the "minority jurors" were harassing or coercing the "majority jurors," either at the time the note was sent out or otherwise. Fourth, it is untrue that the "majority jurors attempted to convey a written complaint to the court." The only evidence concerning any "complaint" was that *one* juror (not "the majority jurors") made an oral (not "written") report to a court security officer about another juror's alleged fraternization with a court security officer. Fifth, the jury was never sent "back to resume deliberations"—its deliberations continued unabated throughout the nearly three weeks it was out, no impasse was ever reported, and no dynamite charge was ever given. Sixth, there is simply no evidence that "the majority jurors at that point gave up." Finally, the statement that court security officers selected the jurors to meet with the press is without any record support.

Petitioners' factual representations are apparently based on a selective and fantastical reading of bits and pieces from newspaper accounts of the jury deliberations. This is outrageous. Newspaper reports, of course, are inadmissible hearsay and inherently unreliable. Moreover, it is well-settled that the press and other bystanders cannot impeach a verdict by relating a juror's report as to how that verdict was reached. *See, e.g., United States v. Friedlands*, 660 F.2d 919, 927-28 (3d Cir. 1981), *cert. denied*, 456 U.S. 989 (1982).

parties or their representatives from contacting the jurors, petitioners had employed a private investigator to interview selected jurors and generate these allegations.[3] *See R. App.* A4-A6, A17-A22, A25-A26, A30-A31, A35-A36, B22.

Despite petitioners' failure to present any competent evidence supporting their claims of jury misconduct (itself grounds under Fifth Circuit precedent to deny the motion for new trial without a hearing),[4] the district court, in an abundance of caution, decided to investigate the allegations. Exercising the discretion given it by case law in the Fifth and other circuits to tailor the investigation so as to minimize the harm from invading the sanctity of the jury room,[5] the trial court chose to examine the jurors individually, under oath, outside of the presence of the parties and their counsel. *P. App.* A2. Following Fed. R. Evid. 606(b), the court limited its questioning to whether extraneous information had been considered by the jury and whether court personnel had attempted to influence jurors or had talked to any of them about the case. The full transcript of the examination of the jurors is attached as Appendix A, at Al-A36.

A hearing on the motion for new trial was held the day following the juror examination. The complete transcript of that hearing is attached as Appendix B, at B1-B24. The district judge began the hearing by stating that, based on his examination of the jurors, he had "a good idea of what happened." *R. App.* B2. Because "the jurors' testimony was consistent on the essential issues," the court required petitioners' counsel to tell it "what evidence to the contrary you have before I allow any further testimony." *Id.* The judge then asked petitioners' counsel a series of pointed

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[3] That fact alone would have been sufficient reason to deny the motion for new trial. *See Tanner v. United States*, 483 U.S. 107, 126 (1987).

[4] *See, e.g., Haeberle v. Texas International Airlines*, 739 F.2d 1019, 1021 (5th Cir. 1984).

[5] *See* pp. 12 - 13, *infra*.

questions inquiring whether he had any evidence that extraneous information, in addition to those matters already identified by the jurors, had been discussed in deliberations or otherwise had come to the jury's attention. Counsel never responded directly to these questions. Instead, he proposed inferences from the transcript of the juror examination, offered evidence of juror "coercion," complained that the court had not asked the questions in the precise way he would have liked, argued that the evidence at the hearing should not be limited by Fed. R. Evid. 606(b), and asked to put on evidence of an alleged "cover-up" by the Marshall's office of a juror complaint. *See R. App.* B4-B5, B9-B10, B11, B12-B17, B18-B19. No offer of proof inconsistent with the facts as developed by the jurors' testimony was ever made. As a result, the district court did not see the need for further testimony. *P. App.* A2.

Based on the juror testimony and the hearing, the district court was "convinced the only extraneous matter[s] which [were] brought to the jury's attention concerned" (1) a mention of a rumor that a defendant's former wife had been in a mental institution; and (2) a report of "settlement discussions" between lead counsel for petitioners and lead counsel for respondents. *P. App.* A4. In both instances, the district court found, these "facts" were "mentioned only briefly," the jury foreman "directed the other jurors that [these facts] could not be considered," and the jurors considered them "of little or no significance." *Id.* A4-A5. The court therefore concluded that "there is no reasonable possibility that [petitioners] were prejudiced by the introduction of these facts." *Id.* A5.

The record overwhelmingly supports each of these findings by the trial court. In the juror examination, the district judge specifically asked each juror, usually more than once, to tell him of any extraneous facts brought up during deliberations. *See R. App.* A2-A4, A7-A8, A13-A16, A23-A24, A28-A29, A32-A34. Five of the six jurors recalled some mention of the former wife's institutionalization. The information itself had nothing to do with the merits of the case. *P. App.* A5. The source of the information was identified (a

rumor one of the jurors had heard while working for a local newspaper some years ago), and the juror testimony established that the matter was mentioned only once during the three weeks of deliberations and then dropped. *Id.* A7-A8, A13-A14, A23-A24. Moreover, the nature of the information, as described by the juror who had brought up the rumor (the defendant allegedly "drove his first wife nuts"), on its face seems far more likely to prejudice defendants than to generate sympathy for them.

Only one juror recalled any mention of the so-called "settlement discussions"—in reality, light banter between counsel.[6] That juror testified that the matter was referred to only once and that the foreman then said that the jury should not consider it, but must decide the case based solely on the evidence. *R. App.* A34. And to say, as petitioners do in their brief, that the effect of the comment "was so profound that they 'just stared at him' " [*Pet.* 12] completely ignores the undisputed facts that only one juror even remembered the incident (a strong indication of the lack of importance the jurors attached to it) and that the subject was immediately dropped with the admonition not to consider it. It also blatantly misrepresents the context in which the "just stared at him" statement was made, as well as the overall import of that same juror's testimony. *See R. App.* A33-A34.[7]

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[6] Contrary to the assertions in petitioners' brief, the "settlement discussions" reported by the juror consisted of a brief (and apparently not serious) exchange between the lawyers that basically amounted to the plaintiffs' lawyer saying to the defense lawyer "Pay what you owe and we'll all go home," and the defense lawyer saying "No." The reference of payment to "ex-shareholders" in the juror's report of the plaintiffs' "offer" can only be understood to refer to the *entire* plaintiff class in light of defense arguments repeatedly characterizing the plaintiff class as consisting largely of *former* shareholders and the lawsuit as one in which the *former* shareholder class was attempting to recover money from the *present* shareholders.

[7] The juror's complete sentence from which petitioners lifted the "just stared at" language was: "I guess we were arguing about something, and so he brought that up, and then we just stared at him, and *so we just kept on reading.*" *R. App.* A34.

The trial court also noted that the jurors had briefly discussed a few "non-factual issues" that would naturally come up at some point in a lengthy deliberation: the existence of insurance to cover damages, the effect of any judgment on the local economy, the possibility that damages would be trebled, and the allocation of costs. *P. App.* A5. These speculations were, as the jury interviews demonstrated, quite limited; none received extensive discussion. *See R. App.* A13-A14, A23-A24. Convinced that these brief musings involved the "internal functioning" of the jury and thus did not constitute extraneous information or outside influence, the district court held that they "are proscribed by Rule 606(b) as a basis for challenging the verdict." *P. App.* A5.

Finally, the district court found moot, for purposes of the new trial motion, the failure of the Marshall's office to pass on a juror's oral report of another juror's alleged fraternization with a court security officer and supposed knowledge of matters not introduced in evidence (the institutionalization of a defendant's former wife). *P. App.* A6. The court reasoned that, whatever might have happened had the Marshall timely reported the incident, it "now knows about the conduct in the jury room" and "there is no basis for a new trial." *Id.* Moreover, the district court noted, the testimony of the complaining juror had established that her complaint was without substance. *Id.; see R. App.* A26-A27. It would be pointless to speculate about what might have happened if the matter had come to its attention earlier, the court said, rejecting the invitation to "examine the issue as if it had been raised before the verdict" as contrary to Fed. R. Evid. 606(b) and "the policy reasons behind" that rule. *Pet. App.* A5-A6.

Again, the record amply supports the trial court's findings. Every juror was asked by the district court if he or she had talked with security officers or other court personnel about the facts of the case; every juror answered that he or she had not. *See R. App.* A4, A8, A17, A24, A30, A35. The juror who had allegedly been seen chatting with one of the court security officers explained that they had merely conversed ("just conversation")—not an unexpected or remarkable development over the course of a trial in which the

jurors and the security officers were together almost every day for five months—and unequivocally denied that they had ever discussed the facts of the case. *Id.* A8-A9, A10-A11. No juror testified otherwise. A rumor one of the other jurors had heard years ago, not a court security officer, was identified as the source of the extraneous information. *Id.* A7-A8. Even the complaining juror's testimony established that she had merely observed the juror and the court security officer talking together after lunch and that she did not know, either directly or otherwise, what they had talked about. *Id.* A26-A27.

In its meticulous opinion denying petitioners' motion for new trial, signed November 6, 1987, the district court felt compelled to comment "on what obviously were highly exaggerated and unfounded allegations of jury misconduct." The judge said:

> Such allegations are serious matters, necessitating the type of inquiry conducted here, and because they are so serious, they should not be made lightly. These jurors were accused of bias in favor of defendants, concealment of conflicts of interest, romantic involvement with court personnel, and considering extraneous prejudicial information in violation of this Court's instructions. Such accusations reflect not only on their integrity as jurors but also their personal lives. *All of these claims are wholly unfounded.* The jurors patiently listened to the evidence without predisposition to one side or the other. The extraneous facts which were brought to their attention were extremely minor in the context of this lengthy and complicated case, were discussed only briefly, and did not prejudice plaintiffs. As Mullins stated, the claim of a romantic involvement between a court security officer and another juror was "preposterous."
>
> As for the deliberations themselves, *the consensus among the jurors was that foreman Mullins directed the jury's attention to the evidence and to the Court's charge, and away from discussion of other matters.* The jury spent five months listening to the evidence (much longer than the parties, at the beginning, had represented the trial would take) and two weeks in deliberations. While jury duty is almost always an inconvenience, the sacrifice these jurors made was above and beyond the call of duty. They arrived at a unanimous verdict in the jury room

> and, after the verdict was read in open court, confirmed their decision.
>
> The Court wishes to express to the jurors its regret that they were subjected to such accusations, and the necessity of the inquiry by the Court. They conducted themselves in an exemplary fashion, and performed an extraordinary task under the most difficult of circumstances. Despite what has happened, it is this Court's hope that they will not remember their experiences in this trial as unpleasant ones but with pride in the knowledge of a job well done and of the essential part they played in the functioning of the judicial system of the United States.

P. App. A7-A8 (emphasis added).

After the district court denied the motion for new trial, petitioners' counsel, without notice to respondents, took a sworn question and answer statement from one of the court security officers, Finton Stewart. Stewart's arrest for attempting to sell to petitioners information which would purportedly show that the jury was "compromised" had apparently been the catalyst for the allegations of jury misconduct. Petitioners then forwarded a transcript of the statement to the court of appeals, which referred to and briefly summarized the statement in its opinion. *P. App.* A23-A24.

Stewart's statement was tendered to the court of appeals as the testimony petitioners would have put on at the hearing on the motion for new trial had they been permitted to do so by the district court. If anything, however, the transcript merely adds support to the trial court's conclusion that testimony from Stewart or other security officers at the new trial hearing was neither relevant nor necessary.

In his statement, Stewart indicated that one of the jurors had been seen several times talking with a court security officer, reported hearsay to the effect that the two had been seen on one occasion outside the courthouse, and related (again through hearsay) the incident in which one of the other jurors had complained about the juror's talking with the security officer. *P. App.* A23-A24. That testimony simply confirms what the jurors had told the Court. Stewart did not know the substance of any conversations between the juror

and the court security officer. *Id.* A23. Nor does his statement tend to show that the jury had mentioned any extraneous facts other than those identified by the jurors themselves or that improper outside influence had otherwise been brought to bear. Stewart's account of the incident involving a juror complaint adds nothing of significance to that which the complaining juror had reported in response to questions from the district judge. As the district court found, since it already knew "about the conduct in the jury room" through its examination of the jurors, any further inquiry into the incident did not have anything to do with the new trial motion. *Id.* A5-A6.

On appeal, a unanimous and distinguished panel of the Court of Appeals for the Fifth Circuit, Judges Gee, Reavley, and Higginbotham, commended the district court for its handling of the allegations of jury misconduct. *P. App.* A24. Writing for the court and relying on Fifth Circuit precedent giving the trial court discretion to determine how best to gather information regarding alleged jury misconduct, *see, e.g., Martinez v. Food City, Inc.*, 658 F.2d 369, 372 (5th Cir. 1981), Judge Higginbotham unreservedly approved the district court's "careful attempt to draw the balance required by Rule 606(b)" by examining the jurors in camera and limiting its inquiry "into what extraneous information had been discussed by the jury and whether court personnel had attempted to influence the jurors." *P. App.* A24. The court of appeals further noted that the district court had given petitioners "the opportunity to offer evidence of jury tampering, but refused to allow a 'fishing expedition.' " *Id.*

On the question of the extraneous information mentioned by the jury, the court of appeals agreed with the district court's conclusion that "there was no reasonable possibility that this information [the institutionalization of a defendant's former wife and the report of "settlement discussions"] prejudiced" petitioners. *P. App.* A25. With respect to the other nonevidentiary matters that were brought up, such as the existence of insurance, the court held that the district court had not abused its discretion in concluding that those matters did not constitute "'extraneous influence" under Fed. R.

Evid. 606(b). *Id.* Moreover, the court of appeals said, even if those subjects could be considered extraneous influence within the rule, "we find no reasonable possibility of prejudice to the appellants, given the instruction by the court that deliberations were to be confined to the evidence at trial and the credited testimony of the jury foreman that he reminded the jury of its duty to confine itself to the evidence." *Id.*

In sum, the court of appeals concluded, the district court had not abused its "broad discretion" in denying the motion for new trial. No motion for rehearing or suggestion of rehearing en banc was filed.

REASONS FOR DENYING THE WRIT

There is absolutely no reason for this Court to grant the petition for writ of certiorari. The case raises no conflict in the decisions of the lower courts; rather, the district court and the court of appeals applied well-settled principles under Fed. R. Evid. 606(b) and the governing case law. Every court of appeals to address the matter has recognized that the trial court has substantial discretion both in choosing the method it uses to investigate allegations of jury misconduct and in ruling on a motion for new trial based on such allegations. Petitioners' contention is merely that this district court abused that discretion in this particular case—hardly a matter worthy of this Court's review.

Nor should this Court review the fact findings of the district court and the court of appeals, especially since those fact findings not only have substantial support in the record, but are virtually compelled by the evidence of the jurors themselves. Finally, there is no reason at all to accept petitioners' apparent invitation to rewrite Fed. R. Evid. 606(b) and allow post-verdict impeachment of jury verdicts through a free-wheeling inquiry into the jury's deliberations, as petitioners evidently propose, simply because the allegations of jury misconduct might have come to the court's attention before the verdict. The proposed exception would inevitably swallow the rule and destroy the unbroken string

of decisions in this Court, dating back to at least 1892,[8] that jurors cannot impeach their own verdict.

I.

The Case Raises No Conflict in the Decisions of the Lower Courts

Although the argument is not clearly articulated, petitioners appear to take issue with several of the legal principles on which the opinions of the district court and the court of appeals are grounded—principally, the discretion accorded the trial court in investigating allegations of jury misconduct, the standard used in determining that the extraneous facts considered by the jury were not prejudicial, and the limitations on the scope of juror testimony applied by the district court during its examination of the jurors.[9] Those principles, however, are well-established and universally accepted.

A. All the Lower Courts Recognize That the District Court Has Discretion in Determining How Best To Conduct an Investigation into Allegations of Jury Misconduct.

The district court and the court of appeals followed established Fifth Circuit precedent in holding that, given

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[8] *Mattox v. United States*, 146 U.S. 140 (1892).

[9] Petitioners also contend that the court of appeals' remark that "the line between consideration of facts not received in evidence and extraneous influence is uncertain at the margin" indicates some confusion in the lower courts which requires this Court's guidance. *See Pet.* 23, 24. Petitioners' effort to turn an offhand truism into an issue meriting Supreme Court review can only be described as heroic. Line-drawing of the sort embodied in Fed. R. Evid. 606(b), as described by the court of appeals, always entails "uncertainty at the margin." And it is the quintessential province of the lower courts, not this Court, to make the kinds of judgments such line-drawing requires. Moreover, the court of appeals held that any "uncertainty at the margin" is irrelevant in this case. Whichever side of the line the nonevidentiary matters considered by the jury fall on, the court said, "we find no reasonable possibility of prejudice" to petitioners. *P. App.* A25. Thus, even if the application of established standards to specific fact situations were a matter appropriate for this Court's exercise of its certiorari jurisdiction, the issue is not even presented.

judicial reluctance to intrude upon the jury's subjective deliberation process, the trial court has substantial discretion in determining how to conduct an investigation into allegations of jury misconduct. *See Martinez v. Food City, Inc.*, 658 F.2d 369, 374 (5th Cir. 1981); *Carson v. Polley*, 689 F.2d 562, 580 (5th Cir. 1982). The procedure that the district court used in this case—*in camera* examination of the jurors and a hearing at which petitioners were given the opportunity to adduce additional evidence showing that extraneous facts were considered by the jury—was consistent with the court's duty to tailor any jury investigation "to minimize the harm likely to result from invading the sanctity of the jury room, while recognizing the need for an adequate hearing." *Martinez, supra*, 658 F.2d at 374.

Every other circuit to address the matter has recognized that the trial court has broad discretion in investigating allegations of jury misconduct. *See, e.g., United States v. Campbell*, 684 F.2d 141, 151 (D.C. Cir. 1982); *United States v. Doe*, 513 F.2d 709, 712 (1st Cir. 1975); *United States v. Calbas*, 821 F.2d 887, 896 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 1114 (1988); *Government of Virgin Islands v. Dowling*, 814 F.2d 134, 137 (3d Cir. 1987); *United States v. Gravely*, 840 F.2d 1156, 1159 (4th Cir. 1988); *United States v. Franks*, 511 F.2d 25, 38 (6th Cir.), *cert. denied*, 422 U.S. 1042 (1975); *United States v. Thibodeaux*, 758 F.2d 199, 202 (7th Cir. 1985); *United States v. Hendrix*, 549 F.2d 1225, 1227-28 (9th Cir.), *cert. denied*, 434 U.S. 818 (1977); *United States v. Bradshaw*, 787 F.2d 1385, 1389-90 (10th Cir. 1986); *United States v. Ayarza-Garcia*, 819 F.2d 1043 (11th Cir.), *cert.*

denied, 108 S. Ct. 465 (1987).[10] This rule minimizes the inevitable disruption and other potentially adverse effects of examining jurors about their deliberations. It also promotes the values embodied in Fed. R. Evid. 606(b): freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment. *See Notes of Advisory Committee*, Fed. R. Evid. 606(b). The opinions below on this issue do not warrant review by this Court.

B. There is No Conflict Between the Decisions Below and the Generally-Accepted Standards for Determining the Prejudicial Effect of Extraneous Facts.

Petitioners appear to contend that the district court and the court of appeals applied an incorrect standard in determining that the extraneous facts mentioned by the jury did not prejudice them, arguing that the courts below "failed to shift the burden as required." *Pet.* 3, 23. The standard the courts below used, however, is precisely the standard this Court has announced and the circuit courts have followed.

The district court described the applicable standard as follows:

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[10] After *United States v. McKinney*, 429 F.2d 1019, *rev'd on rehearing*, 434 F.2d 831 (5th Cir. 1970), *cert. denied*, 401 U.S. 922 (1971), there was some initial confusion regarding whether any allegation of juror misconduct (no matter what, or how well-supported, those allegations might be) required the trial court to convene a hearing. *See United States v. Brantley*, 733 F.2d 1429, 1439 (11th Cir. 1984), *cert. denied*, 470 U.S. 1006 (1985); *United States v. Doe*, 513 F.2d 709, 712 (1st Cir. 1975). As noted in *United States v. Bradshaw*, 787 F.2d 1385, 1389-90 (10th Cir. 1986), and *United States v. Boylan*, 698 F. Supp. 376, 387 n.11 (D. Mass. 1988), this confusion apparently stemmed from the failure to note that *McKinney* had been reversed on rehearing. Any difference of view, moreover, has now been resolved. *See Boylan, supra*, 698 F. Supp. at 387 n.11, *citing Neron v. Tierney*, 841 F.2d 1197, 1202 (1st Cir.), *cert. denied*, 109 S. Ct. 90 (1988); *United States v. Ayarza-Garcia*, 819 F.2d 1043, 1051 (11th Cir.), *cert. denied*, 108 S. Ct. 465 (1987); *United States v. Barshov*, 733 F.2d 842, 851 (11th Cir. 1984), *cert. denied*, 469 U.S. 1158 (1985). Nor is the issue raised in this case, in which the district court did convene a hearing and examine the jurors in response to the allegations, thus satisfying its obligations even under those early cases which had suggested that some sort of hearing might always be required.

> [A] presumption of prejudice arises when it is shown that contact with a juror occurred. *Remmer v. United States*, 347 U.S. 227, 229, 74 S. Ct. 450, 451, 98 L.Ed. 645 (1954); *United States v. Howard*, [506 F.2d 865, 869 (5th Cir. 1975)]. The trial court must determine: (1) what, if any, extraneous matter was disclosed in the jury room, and, if so, (2) whether there was a reasonable possibility that it was prejudicial .... Based upon the objective demonstration of extrinsic factual matters disclosed in the jury room, the trial court must determine the "reasonable possibility of prejudice."

P. App. A4. The court of appeals used an identical standard. *Id.* A25. Both courts concluded that "there was no reasonable possibility" that any of the extraneous information mentioned in the jury room prejudiced petitioners. *Id.* A5, A25.

This standard—that in order to find that the extraneous information was not prejudicial, the court must be convinced that there is "no reasonable possibility" of prejudice—does "shift the burden." In fact, it more than shifts the burden; it requires a finding that, to a virtual certainty, the information did not prejudice the losing party. Thus, the standard is consistent with that announced by this Court in criminal cases involving improper juror contacts—that the burden "rests heavily upon the Government" to show "that such contact with the juror was harmless." *Remmer v. United States*, 347 U.S. 227, 229 (1954). *See Smith v. Phillips*, 455 U.S. 209 (1982); *Rushen v. Spain*, 464 U.S. 114 (1983). Similarly, the "no reasonable possibility of prejudice" standard is consistent with those applied by other courts of appeal in similar circumstances. *See, e.g., Haley v. Blue Ridge Transfer Co.*, 802 F.2d 1532, 1537 (4th Cir. 1986); *United States v. Bagley*, 641 F.2d 1235, 1240 (9th Cir.), *cert. denied*, 454 U.S. 942 (1981); *United States v. Day*, 830 F.2d 1099, 1106 (10th Cir. 1987); *United States v. Brantley*, 733 F.2d 1429, 1441 (11th Cir. 1984), *cert. denied*, 470 U.S. 1006 (1985).

There is simply no substance to petitioners' argument that the courts below improperly failed to shift the burden of proof or that they used an incorrect standard in evaluating the impact of the extraneous facts mentioned during jury

deliberations. The district court and court of appeals opinions on this score certainly do not merit review by writ of certiorari.

C. This Case Presents No Occasion for Departing from the Well-Established Limitations on Juror Testimony Applied by the Courts Below.

The trial court carefully limited its interrogation of the jurors to whether extraneous information had been discussed in the deliberations and whether court personnel had attempted to influence the jurors or had talked to them about the facts of the case. *See R. App.* A. The court of appeals wholeheartedly approved that "careful attempt to draw the balance required by Rule 606(b), inquiring into objective events that might constitute extraneous influences on the jury, while avoiding any examination of the jury's subjective deliberation process." *P. App.* A24.

The trial court's application of the Fed. R. Evid. 606(b) limitations on juror testimony follows the guidelines repeatedly stated by this Court and the courts of appeal. Those guidelines prohibit any inquiry into such matters as the effect of extraneous information or the scope and conduct of the jury's deliberations. *See, e.g., Rushen v. Spain,* 464 U.S. 114, 121 n.5 (1983); *Mattox v. United States,* 146 U.S. 140, 149 (1892); *United States v. Campbell,* 684 F.2d 141, 151-52 (D.C. Cir. 1982); *Ohanian v. Avis Rent-a-Car System, Inc.,* 779 F.2d 101, 110 (2d Cir. 1985); *Government of Virgin Islands v. Gereau,* 523 F.2d 140, 149-50 (3d Cir. 1975), *cert. denied,* 424 U.S. 917 (1976); *Shillcutt v. Gagnon,* 827 F.2d 1155, 1158 (7th Cir. 1987); *Poches v. J. J. Newberry Co.,* 549 F.2d 1166, 1169 (8th Cir. 1977); *Traver v. Meshriy,* 627 F.2d 934, 941 (9th Cir. 1980); *United States v. Ayarza-Garcia,* 819 F.2d 1043, 1051 (11th Cir. 1987), *cert. denied,* 108 S. Ct. 485 (1987). Coercion, intimidation, harassment, and other intrajury influences all fall within the rule proscribing any evaluation of the jury's subjective thought processes. *See, e.g., Government of Virgin Islands v. Gereau, supra,* 523 F.2d at 149-50; *Shillcutt v. Gagnon, supra,* 827 F.2d 1155, 1158; *United States v. Ayarza-Garcia, supra,* 819 F.2d at 1051.

Petitioners, however, appear to suggest that this case is somehow not governed by Fed. R. Evid. 606(b) because the alleged jury misconduct might have come to light several days before the verdict if a juror's inquiry to a court security officer had been reported to the court. This argument was the principal ground petitioners advanced in the district court for being permitted to put on evidence of "everything that was going on," including "a whole litany of coercion in that jury room." *R. App.* B11-B13, B15-B20; *P. App.* A5-A6. Similarly, in their petition for writ, petitioners suggest that Rule 606(b) "only applies to post-verdict problems" and that when "the record discloses the kinds of problems that existed [here]—pre-verdict—Rule 606 has no further application." *Pet.* 22.

This apparent exception to Fed. R. Evid. 606(b) that petitioners ask this Court to fashion out of whole cloth is ill-defined and uncertain in both nature and scope. What is clear is that there is no support for the proposed exception in the rule itself, which unequivocally limits the scope of any "inquiry into the validity of a verdict," or in the case law. Petitioners do not cite one case that has even discussed the *possibility* of such an exception, much less one that has adopted it. Indeed, the proposed exception appears to be one that petitioners have invented just for the unique facts of this case.

But the proposed "exception," whatever its contours may be, would in fact be no exception at all. Taking the argument at face value, petitioners contend that if the allegations of juror misconduct might, or could, have come to the court's attention before the verdict, then any post-verdict inquiry should not be limited by Rule 606(b) and the established rules governing juror testimony, but may delve into the entire gamut of the jury's deliberations—including, apparently, into allegations of "coercion" and "harassment." *R. App.* B15-B18; *Pet.* 7, 22. Adopting a judge-made exception of this sort, however, would destroy Fed. R. Evid. 606(b)—and the important policies the rule was designed to promote.

Indeed, the basic premise of the proposed exception is insupportable. Every allegation of jury misconduct involves "problems that existed pre-verdict"; there is simply no distinction, much less a workable one, between "pre-verdict" and "post-verdict" problems. Any inquiry into the jury's subjective thought processes, whether conducted pre- or post-verdict, impermissibly invades the sanctity of the jury room.[11] In fact, full-scale investigative hearings conducted mid-trial or mid-deliberation would be *more* disruptive and *more* violative of the policies underlying Fed. R. Evid. 606(b) than post-verdict hearings. And were this Court to accept petitioners' argument that a different standard applies to allegations of misconduct which might have arisen before the verdict, the certain result would be to encourage trial judges to hold pre-verdict investigative hearings at the slightest hint of a problem—hardly a desirable prospect.

Moreover, adoption of the proposed exception would also ensure that *post*-verdict hearings into alleged jury misconduct would become commonplace. Enterprising litigants, given the incentive, would not have any difficulty hypothesizing ways that "pre-verdict" problems might have come to the court's attention before the verdict. The evidence to support such claims would likely be developed through extensive and potentially harassing inquiries of jurors about their deliberations.

Tanner v. United States, 483 U.S. 107 (1987), illustrates just some of the difficulties to which the proposed exception

[11] Many of the cases involving alleged extraneous influence and the discretion accorded the trial court in handling such matters are cases in which the problem came to the court's attention during the trial or the deliberations. *See, e.g., Carson v. Polley*, 689 F.2d 562, 579-82 (5th Cir. 1982); *United States v. Duzac*, 622 F.2d 911, 913-14 (5th Cir.) *cert. denied*, 440 U.S. 1012 (1980); *United States v. Doe*, 513 F.2d 709 (1st Cir. 1975); *United States v. Thibodeaux*, 758 F.2d 199, 202 (7th Cir. 1988); *United States v. Hendrix*, 549 F.2d 1225, 1226-30 (9th Cir.), *cert. denied*, 434 U.S. 818 (1977). In several of these cases, post-trial motions for new trial were also filed and were treated no differently under Fed. R. Evid. 606(b) than any other post-trial motion for new trial based on alleged jury misconduct. *See United States v. Duzac, supra*, 622 F.2d at 913-14; *United States v. Hendrix, supra*, 549 F.2d at 1226-30.

would inevitably give rise. In that case, this Court affirmed the district court's refusal even to hold a post-verdict hearing on substantiated allegations of extensive alcohol and drug abuse by the jurors during trial, holding that Rule 606(b) barred such testimony. *Id.*, at 121-25. The jurors' conduct occurred "pre-verdict" (it apparently began shortly after the jury was sworn and continued unabated throughout the proceedings), and there was some indication of the problem during trial. *Id.*, at 115-16. This Court recognized nonetheless that to allow juror testimony concerning the allegations would jeopardize the "substantial policy considerations" supporting the common law rules and Fed. R. Evid. 606(b), including the need to assure full and frank discussion in the jury room, to prevent the harassment of jurors by losing parties, and to preserve the community's trust in the jury system. *Id.*, at 119-21. Those considerations are even more strongly implicated in this case, in which petitioners' proposed exception would, by their own admission, make the entire three-week jury deliberation a matter for an adversarial public hearing involving extended cross-examination of jurors. As Justice O'Connor stated in *Tanner*, "it is not at all clear, however, that the jury system could survive such efforts to perfect it." *Id.*, at 120.

II.

This Court Should Not Review the Fact Findings or the Exercise of Discretion by the Courts Below

Because the legal principles relied on by the courts below are well-established and unexceptionable, petitioners in effect are asking this Court to grant certiorari merely to review the district court's and court of appeals' application of those principles. Petitioners complain, for example, that the district court abused its discretion in the manner by which it conducted the hearing on the motion for new trial, arguing that they should have had an opportunity to cross-examine the jurors and to question court security officers. *See Pet.* 7, 13-15, 18, 20-22, 24. Similarly, they contest the findings of the

courts below that the extraneous matters mentioned by the jurors were not prejudicial, engaging in extended hypothetical discussions about how that information might have been detrimental to them. *See id.* 8, 11-13. They even take issue with the trial court's credibility determinations and the court of appeals' approval of those judgments. *See id.* 16.

This case is one in which the decision turns almost completely upon its own peculiar facts. Indeed, the lengthy and convoluted statement of the "Questions Presented" by petitioners, although highly inaccurate and misleading, demonstrates perhaps better than any argument both the uniqueness of the controversy and that its resolution is inextricably bound up in questions of discretion and fact. The courts below fully considered the matters now raised, and both resolved the controlling issues in respondents' favor.

Nearly one hundred years ago, in a case involving allegations of jury misconduct, this Court held that the "allowance or refusal of a new trial rests in the sound discretion of the court to which the application is addressed." *Mattox v. United States*, 146 U.S. 140, 147 (1892). *See Holt v. United States*, 218 U.S. 245, 251 (1910) (Holmes, J.). This rule recognizes that the trial court is in the best position to evaluate allegations of juror misconduct and their potential prejudicial effect. This Court's certiorari jurisdiction should not be invoked merely to review the kinds of discretionary and factual decisions the lower courts render every day, in every case, and are in a better position to make. *See, e.g., United States v. Johnston*, 268 U.S. 220, 227 (1925). That is particularly so when, as in this case, the decisions below are unassailable on factual grounds and no important constitutional issues are at stake.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Dated: July 22, 1989

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No. 88-2096

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

ROBERT J. BOLTON, *et al.*,
Petitioners,

v.

TESORO PETROLEUM CORPORATION, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX TO RESPONDENTS' BRIEF IN OPPOSITION

APPENDIX A

THE DISTRICT COURT'S EXAMINATION OF THE JURORS

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ROBERT J. BOLTON, *et al.*,

Plaintiffs,

VERSUS

TESORO PETROLEUM CORPORATION, *et al.*,

Defendants.

Docket No. SA-82-CA-824
Docket No. SA-82-CA-825

San Antonio, Texas
November 5, 1987

ROBERT J. BOLTON,

Plaintiff,

VERSUS

ROBERT V. WEST, *et al.*,

Defendants.

STATEMENT OF FACTS

BEFORE THE HONORABLE H. F. "HIPPO" GARCIA, and a jury.

VOLUME NO. 55
(PAGES A4552-A4598)

(Said hearing being conducted in the Court's chambers in the presence of the Court, Mr. John Primomo, and the Court Reporter Maurice West, beginning approximately five minutes to nine on the 5th day of November, 1987)

MR. PRIMOMO: This is Mrs. Rodulfo, is that correct?

MRS. RUDOLFO: Yes.

THE COURT: What is your first name?

MRS. RUDOLFO: Lorraine.

THE COURT: Lorraine Rodulfo.

MRS. RUDOLFO: Uh-huh.

THE COURT: Okay. Do you want to raise your hand, and solemnly swear that the testimony you are about to give in this case will be the truth, the whole truth, and nothing but the truth, so help you God?

MRS. RODULFO: Yes.

THE COURT: Now, I'm going ask you some questions about the Tesoro case, and this is not a criminal investigation, and I'm not accusing you of doing any wrongdoing. It's just that I need to ask you these questions, and I do want you to tell me about your—I do not want you to tell me about your thought processes during deliberations or what caused you to render your verdict, I just want you to answer the specific questions I'll ask, okay?

MRS. RODULFO: Okay.

THE COURT: And that is, what, if any, facts were discussed in the jury room during the deliberations which did not come out in the courtroom during the trial? Do you know of any?

MRS. RODULFO: No.

THE COURT: Okay. Other than the evidence concerning Dr. West's former wife being in a mental institution, did Mr. Mullins, as the foreman, discuss other extraneous matters

or did he direct the jury's attention to the evidence introduced at the trial?

MRS. RODULFO: The evidence of the trial, that's the only thing.

THE COURT: He did that?

MRS. RODULFO: He directed us, you know, like what a foreman should do, you know. But Mrs. West—

THE COURT: —Well—

MRS. RODULFO: —I'm kind of confused right now. Can you explain it?

THE COURT: Other than the evidence concerning Dr. West's former wife being in a mental institution, did you ever hear that?

MRS. RODULFO: Oh, in there?

THE COURT: During the deliberations?

MRS. RODULFO: I heard it, yes.

THE COURT: Now, other than that, did Mr. Mullins, as the foreman, discuss other extraneous matters, or did he direct the jury's attention to the evidence introduced at the trial? As the foreman?

MRS. RODULFO: As the foreman?

THE COURT: Uh-huh.

MRS. RODULFO: From the trial, you mean? Yes.

THE COURT: Direct your attention to the evidence entered into the trial?

MRS. RODULFO: Yes.

THE COURT: And that was—you all were deliberating several days?

MRS. RODULFO: Yes.

THE COURT: All right. And you don't know of any other information other than was introduced during the trial that you heard about in the jury room, is that right?

MRS. RODULFO: Yes.

THE COURT: Did you ever talk to any court security officers or other court personnel concerning the facts of the case?

MRS. RODULFO: No.

THE COURT: Did they try to talk to you about the facts in the case?

MRS. RODULFO: No.

THE COURT: The security personnel or anybody else?

MRS. RODULFO: No.

THE COURT: They never stopped you?

MRS. RODULFO: No, they never stopped me.

THE COURT: Going in and out or talked to you about the facts in the case?

MRS. RODULFO: No, sir.

THE COURT: Were you contacted by anyone during the trial or during the deliberations who you believe was a representative of the Plaintiffs or the Defendants?

MRS. RODULFO: No.

THE COURT: Have you been contacted by anyone since the verdict that you believe was a representative of the Plaintiffs or the Defendants?

MRS. RODULFO: Contacted?

THE COURT: Talked to you.

MRS. RODULFO: After the deliberations?

THE COURT: After the trial.

MRS. RODULFO: After the trial?

THE COURT: After it was all over with.

MRS. RODULFO: Besides the reporters—no, that's not right.

THE COURT: No.

MRS. RODULFO: An investigator wanted to talk to me.

THE COURT: Do you remember his name?

MRS. RODULFO: No, I don't remember. He wanted to talk to me, but I told him I was busy, and he never called back.

THE COURT: He never called back.

MRS. RODULFO: He gave me his name, but I had the baby and stuff like that, so I was—

THE COURT: —It was a man for the—he said he was an investigator for the—

MRS. RODULFO: —For the Plaintiffs.

THE COURT: Plaintiffs?

MRS. RODULFO: Yes, he was investigating, and he just, you know, asked if he could interview me, and I said, no, not at the moment, I'm kind of busy, and I never heard from him again.

THE COURT: Okay.

MR. PRIMOMO: When did that happen?

MRS. RODULFO: Right after.

THE COURT: Do you have any other questions?

MR. PRIMOMO: I'm sorry, I didn't mean to interrupt you.

THE COURT: That's all right, go ahead.

MR. PRIMOMO: I wanted to ask her when it was she was contacted by this person.

MRS. RODULFO: It was right after the trial, yeah, about a couple of days after the trial.

MR. PRIMOMO: Did he tell you he was a representative from the Plaintiffs?

MRS. RODULFO: I remember—I know that he was for the Plaintiffs, because he just, you know, wanted to know about the case and, you know, and stuff like that.

I asked him, are you going to talk to the other jurors, or have you talked to the other jurors, and he said, I'm going to, or, you know, they gave me permission to.

And I said, oh, and I said, but—I said, well, I can't right now, I'm kind of busy. He said okay, and he gave me his number, but I wrote it down, but that was, like—I threw it away, but he never called me or anything like that.

THE COURT: This was all on the telephone?

MRS. RODULFO: Yes, this was all on the telephone.

THE COURT: Did he say who gave him permission to call you?

MRS. RODULFO: No, he didn't. I didn't ask. I thought, you know, because reporters were calling and stuff like that, and they'd, you know, well, she's busy right now, and she doesn't want to talk to you, you know. That's all I remember.

THE COURT: Do you have anything more?

MR. PRIMOMO: You don't remember his name? Would you remember it if you heard it?

MRS. RODULFO: God, I don't know.

MR. PRIMOMO: Does the name Jack Compton ring a bell?

MRS. RODULFO: No, not really. I know he wasn't a Mexican name. He had, you know, a white man's last name, but that's all I can tell you. He was calling long distance. I don't know where he was calling from. That's all I know.

THE COURT: Okay. Anything?

MR. PRIMOMO: No.

THE COURT: All right. Thank you very, very much for being with us. You may be excused right now.

MRS. RODULFO: Okay. Thank you.

THE COURT: Thank you very much.

(Juror Tammy Albrecht enters the chambers)

THE COURT: Have a seat here, please. You might raise your right hand and be sworn.

Do you solemnly swear that the testimony you are about to give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

MRS. ALBRECHT: I do.

THE COURT: Your first name is Tammy?

MRS. ALBRECHT: Yes.

THE COURT: And your last name is A-L-B-R-E-C-H-T.

MRS. ALBRECHT: Yes.

THE COURT: Now, Mrs. Albrecht, I'm going to ask you some questions about the Tesoro case. Now, this is not a criminal investigation, and I'm not accusing you of any wrongdoing. I do not want—I do want—I do not want you to tell me about your thought processes during the deliberations or what caused you to render your verdict, do you understand that?

MRS. ALBRECHT: Yes.

THE COURT: I just want to ask you to answer the specific questions that I ask.

Now, were you, for any reason, biased in favor of the Defendants or predisposed to rule in their favor?

MRS. ALBRECHT: No, sir.

THE COURT: What, if any, facts were discussed in the jury room during deliberations which did not come out in the courtroom during the trial?

MRS. ALBRECHT: I know that at lunchtime, Joe brought up the fact that Dr. West's first wife was—I don't know how to put it—she was in a mental institution. I don't

know. This is what he had heard through rumor when he worked at the Express.

THE COURT: All right.

MRS. ALBRECHT: That's all that I know that we talked about.

THE COURT: Was this more than once?

MRS. ALBRECHT: It was brought up once, and then it was dropped. That's how important it was.

THE COURT: Well, other than the evidence concerning Dr. West's former wife being in a mental institution, did Mr. Mullins, as the foreman, discuss other extraneous matters or did he direct the jury's attention to the evidence introduced at the trial?

MRS. ALBRECHT: He didn't bring anything in. No, we didn't talk about anything else.

THE COURT: Did he direct the jury's attention to the evidence introduced at the trial?

MRS. ALBRECHT: Yes.

THE COURT: Any other extraneous facts at all?

MRS. ALBRECHT: No, sir.

THE COURT: Now, did you ever talk to any court security officers or other court personnel concerning the facts of the case?

MRS. ALBRECHT: No, sir.

THE COURT: Did they try to talk to you about the facts in the case?

MRS. ALBRECHT: No, sir.

THE COURT: Okay. Did you go to lunch with Dario—what's his last name?

MR. PRIMOMO: Guerra.

MRS. ALBRECHT: No.

THE COURT: Never did?

MRS. ALBRECHT: No, sir.

THE COURT: All right. Were you contacted by anyone during the trial or deliberations who you believe was a representative of the Plaintiffs or the Defendants?

MRS. ALBRECHT: No.

THE COURT: During the deliberations?

MRS. ALBRECHT: No, sir.

THE COURT: Have you been contacted by anyone since the verdict who you believe was a representative of the Plaintiffs or the Defendants?

MRS. ALBRECHT: No, sir.

THE COURT: Since the trial was over with?

MRS. ALBRECHT: No, just the newspapers, but nobody else.

THE COURT: No one else? No private detective or anybody?

MRS. ALBRECHT: No, they haven't gotten me.

THE COURT: Okay. Now, during the course of the deliberations, did Mr. Mullins, act as a foreman, directing your attention to the evidence introduced at the trial? Direct the jury's attention?

MRS. ALBRECHT: Yes.

THE COURT: Any bad thing about it you want to tell me?

MRS. ALBRECHT: No, sir, no. We tried to stick to the issues, and, you know, we got through the charge.

THE COURT: Regarding the security officers, did they in any way act—how did they conduct themselves, as far as you're concerned?

MRS. ALBRECHT: They were fine. They were outside of the door like they were supposed to be, and they never

said anything or questioned us about anything when we would come out on break or at lunch. As far as I know, they were fine.

THE COURT: And as far as you know, you're telling me that the only matter, extraneous matters that were brought up by Mr. Mullins or by anyone was the matter about Dr. West's former wife being in a mental institution?

MRS. ALBRECHT: That was the only thing, and it was so unimportant that we dropped it. We didn't even discuss it anymore during the three weeks.

THE COURT: Okay. Do [sic] you at any time—I want to ask you again—go to lunch or anywhere with this fellow Dario Guerra?

MRS. ALBRECHT: No, not even to lunch.

THE COURT: Okay. Do you have any questions?

MR. PRIMOMO: If I could just talk to you for a second, and if you could just wait outside for you a second?

THE COURT: Okay. Thank you.

(Mrs. Albrecht exits the chambers during off-the-record conference between Mr. Primomo and the Court)

(Mrs. Albrecht re-enters the chambers)

THE COURT: Okay. I just want you to—it doesn't make a particle of difference to me, but if you want to, there were allegations in the newspapers that you were dating this fellow Dario, going to lunch to discuss things with him, is there anything you want to tell me about that?

MRS. ALBRECHT: No, sir. I did not.

THE COURT: Okay.

MRS. ALBRECHT: I would talk to him, you know, just conversation, just being conversation. I never went anywhere with the man.

THE COURT: Okay.

MRS. ALBRECHT: May I ask a question?

THE COURT: Yes.

MRS. ALBRECHT: May I ask who has been saying this?

THE COURT: Well, we read it in the newspapers.

MRS. ALBRECHT: Well, somebody has to be saying it. I don't know who's been saying that. I didn't know if you all were.

THE COURT: No, nobody's said anything to me, telling me anything. They're just going by what's in the newspapers.

MRS. ALBRECHT: No, sir. I have nothing.

THE COURT: All right. I just thought if you wanted to explain something, fine, but you don't have to. All right.

MRS. ALBRECHT: There's nothing to explain.

THE COURT: That's very good. I want to thank you very much for being with us, and that'll be the end of that. Thank you.

MRS. ALBRECHT: Thank you.

(Juror brought into the chambers)

THE COURT: Raise your right hand. Do you solemnly swear the testimony you are about to give in this hearing is the truth, the whole truth, and nothing but the truth, so help you God?

MR. MULLINS: Yes.

THE COURT: All right. Have a seat. You may drink your coffee as we go along.

I'm going to ask you some questions about the Tesoro case, and I'm—this is not a criminal investigation, and I'm not accusing you of any wrongdoing. I do not want you to tell me about your thought processes during deliberations or what caused you to render your verdict. I don't want that. I just want you to answer the specific questions I will ask.

First of all, in connection of your father with the—what is it, Southwest Research?

MR. MULLINS: Yes, sir.

THE COURT: Okay. Your father worked for the Southwest Research?

MR. MULLINS: Yes, sir; thirty-one years.

THE COURT: He is not there now, though?

MR. MULLINS: Yes, sir.

THE COURT: Okay. During the trial, was he there?

MR. MULLINS: Yes, sir.

THE COURT: Okay. Were you aware that West, Bonner, and Frost were on the board of trustees?

MR. MULLINS: No, sir.

THE COURT: Okay. When did you learn of this?

MR. MULLINS: In the post-trial press.

THE COURT: After the trial?

MR. MULLINS: Yes, sir.

THE COURT: In the papers?

MR. MULLINS: Yes.

THE COURT: Okay. From the time you learned this, were you biased in favor of the Defendants or predisposed to rule in their favor?

MR. MULLINS: No, sir.

THE COURT: Okay. You say you learned about this after the trial?

MR. MULLINS: Yes, sir.

THE COURT: Okay. Now, your lady friend works for the Southwest Research, is that right?

MR. MULLINS: Yes, sir.

THE COURT: Did that fact cause you to be biased in favor of the Defendants or predisposed to rule in their favor?

MR. MULLINS: Well, she applied for the job in March. She wasn't accepted for the position until, it was late September, I think. She got the job in September.

THE COURT: Of this year?

MR. MULLINS: Yes. She worked with the Express-News up until that time.

THE COURT: That was after the trial.

MR. MULLINS: Yes, sir.

THE COURT: Then you were—the question again is, were you for any reason biased in favor of the Defendants or predisposed to rule in their favor when this trial started?

MR. MULLINS: No, sir.

THE COURT: Now, what, if any, facts were discussed in the jury room during deliberations which did not come out in the courtroom during the trial?

MR. MULLINS: Well quite obviously in the stories in the newspapers, about Dr. West's first wife, and those were brought, and I raised that. I brought that up, and this was during, I believe, Maureen Bates' testimony.

Although time and time again you asked us not to talk about it, invariably, I recall it taking place in the jury room, and it was during a lunch break or a coffee break, I believe, and Ruth and Catherine were discussing his illiciat [sic] affair with Helen West.

THE COURT: Uh-huh.

MR. MULLINS: I think it's important, I hadn't formulated any opinions at this time. I was really, I was being a bit of a gossip, I suppose, and when I heard this, I made some crude remark to the effect that I heard Dr. West drove his first wife nuts.

THE COURT: I see. And how long was that discussed?

MR. MULLINS: Briefly. It was brought up again—somebody brought it up again during deliberations. I'm not sure who, but we were talking about the Maureen Bates' testimony, and I immediately sat on it. I told them this is not—I heard this was a rumor years ago, and this didn't come out of the courtroom. We cannot consider this. This should not influence your thoughts at all. I was emphatic.

THE COURT: You told them that?

MR. MULLINS: I told them that.

THE COURT: Okay.

MR. MULLINS: There was some other instances also in which individuals had mentioned things that didn't come from the courtroom, minor incidences. Questions of whether or not insurance could be considered in assessing damages.

Catherine, I believe, had mentioned that it didn't really matter how we found on the damages because insurance is going to take care of it anyway, and I told her that I didn't believe that we could consider that. There was some discussion about it, and I said, well, let's just ask Judge Garcia. So I wrote note [sic].

And during this same discussion, actually it drifted around a little bit, and I was talking about—not in these terms—but I was talking, insinuating about the socio-economic impact it would have on a city like San Antonio, all the ramifications, and she was, you know, saying, well, we can't consider that either. And I said, well, let's just, you know, let's not debate it. Let's just ask Judge Garcia.

So, we put it in a vote [sic], and like all notes that we discussed, we put it to a vote, and it had to be a unanimous vote. All our decisions were done that way. And she didn't want it to go in and so the subject was dropped.

THE COURT: Was it ever discussed again?

MR. MULLINS: No, sir.

THE COURT: Any other extraneous facts that you can recall were discussed?

MR. MULLINS: I've been racking my brain, Judge Garcia, and it was a very long trial and hard deliberation. I can't remember anything that's pertinent.

THE COURT: All right. During your deliberations, did you make an effort to stick to what went on in the courtroom, that is the facts, the exhibits, the testimony?

MR. MULLINS: Many, many times I asked the jurors, leave the speculation out of it. Let's find out what the documents are telling us. Let's remember what the testimony was from the stand, and, you know, let's not be speculative. That's not the way Judge Garcia want us to do it. It's in the charge the way he wants us to do it. Let's follow the charge as carefully as we can.

I think I've been accused of ramrodding that charge down their throats, but I was very careful about that.

THE COURT: All right. Let me ask you, aside from the matter concerning Dr. West's wife and being in a mental institution, aside from the mention that was made about insurance policy or insurance would take care of it, or something like that, and aside from the question about what impact it would have on the economy, I believe you mentioned, those are the things that stick out in your mind and those were briefly mentioned, is that correct?

MR. MULLINS: Yes, sir.

THE COURT: Okay. Was that it? Anybody dwell on it?

MR. MULLINS: No, sir. It didn't—we were so busy trying to remember what was coming out of the courtroom and putting those facts and evidence that came from the courtroom to the right part of the interrogatories—there was many charges and many allegations—and then going back and proving or disproving it, that was our principal goal in the jury room.

When a topic was talked about, and if I sensed that it was drifting, you know, I don't remember this coming from the courtroom, I told them that, no, this can't be considered.

Those are the only two or three instances that I can remember were those three specifically, and I do remember the conversations drifting, but there was no—it more like just speculation. It wasn't a specific subject that they were discussing, it was kind of—it wasn't in line with what, you know, our decision. I mean, let me see if I can phrase this better.

We—let me think of a situation. We had a lot of conversations about whether or not there was—this—what was the first general counsel's name? I can't remember his name—Charlie Roberts and whether or not his testimony went before the grand jury, and the tape, and it got to drifting around, you know, well, if it were in fact was considered before the grand jury, and we would—it got, you know, and I said, well, what if they heard that tape or what if they didn't, you know, if that would change their decision, and, obviously, I sent you a note asking for some clarification, and there was quite a bit of debate about that.

I thought that the tape had gone before the grand jury and some people didn't think it went before the grand jury, but the discussion lost its center and drifted around, you know, and I said, well, wait a minute, let's bring this thing back around and remember what we're talking about, you know.

When those types of decisions were before us, if it did or if it didn't, and whether or not that's a factual basis, we—we decided on it as a group, and that's the way we decided these issues.

THE COURT: Okay.

MR. MULLINS: I don't think we ever resolved that. We went about deciding that a little differently. But other than those three specific instances, there wasn't anything that was information out of the outside.

THE COURT: There was no other extraneous matters or facts brought out?

MR. MULLINS: No, sir.

THE COURT: Did you ever talk to any court security officers or other court personnel concerning the facts of the case?

MR. MULLINS: No, sir.

THE COURT: Were you contacted by anyone during the trial or deliberations who you believe was a representative of the Plaintiffs or the Defendants?

MR. MULLINS: No, sir.

THE COURT: During the deliberations?

MR. MULLINS: No, sir.

THE COURT: Or during the trial?

MR. MULLINS: No, sir.

THE COURT: Have you been contacted by anyone since the verdict who you believe was a representative of the Plaintiffs or the Defendants? Not the newspapers, of course.

MR. MULLINS: No. Of course, this is what I discussed with Mr. Primono once before about the possibility someone was trying to contact me. A man representing himself as an insurance adjuster from an insurance firm in Dallas called me up and was rather insistent that I meet him at this motel. La Quinta Motel.

THE COURT: La Quinta?

MR. MULLINS: Yeah. I don't know if you're familiar with that and if I should expound on that or not, but I have a feeling, and because of some discussions I've had with Bill Jennings, that this individual was in fact hired by a representative or somebody from Kingsville, that's the way he said it. Do you want me to go into that?

THE COURT: Go ahead.

MR. MULLINS: Well, after I called the Marshal's Office concerning that attempt to reach me, I might add that it was quite an attempt. The man had apparently got ahold of my old phone number and found out that it was listed under

Kelly Boyles, and I guess he went through the phonebook calling all the Boyles he could until he found some name recognition, kept asking these different residences if they knew Joe Mullins until they finally struck upon Kelly's father.

Well, Kelly's father, actually his girlfriend, called me up and said there is some gentleman trying to get in touch with you. He said it was extremely important, here's his phone number and room number. So I called him up and he gave me the story about being an insurance adjuster, had—claims check for me to pick up. I told him I didn't have any pending litigation or any claims filed anywhere, and he said, "It's just very important I meet you tonight."

Well, of course, I didn't buy that. I called the FBI, and I called—they suggested the U.S. Attorney's office, and I tried them and nobody was there, and then I called the Marshal's Office and I talked to Mr. Musser (phonetic)—is that it?

COURT REPORTER: What was the name?

MR. MULLINS: I believe it's Musser and I could be wrong. I know—it's been awhile—I know who he is.

THE COURT: Is he a Marshal or?

MR. MULLINS: He is, sir. He's the Marshal that led us into the jury room on the day of the verdict.

THE COURT: All right.

MR. MULLINS: He's got kind of sandy-blonde hair, medium height, kind of a big build on him. I could identify him, I know I could.

Anyway, he told me he would get back in touch with me tomorrow about it, and, frankly, I wasn't quite satisfied with that and so I called this General Insurance Company in Dallas and asked them if they had this, his name was Jack Crosby, and I talked with them for some time, and they said, no, there is no Jack Crosby working for us.

Then I called the motel back and I asked for Mr. Jack Crosby, and they told me they didn't have anybody registered by that name, and I said, well, who do you have registered

in room 225, I believe it was. I could be wrong on that. He said Jack Compton.

Well, there wasn't much I could do. The Marshal called me back that next morning and said he didn't think there was much there and not for me to panic or worry about it too much. And I did, I got through that day and didn't think about it too much more up until I had the discussion with Bill Jennings, oh, maybe two weeks ago, and he told me a private investigator had come over to his home and talked to him for some two hours about various things.

This private investigator had started following us immediately after the trial. He knew what restaurant we went to after we got out and went to Denny's across the street, and he said, well, why did you leave Denny's, you know, and we went to El Mirador's after that, and he knew that.

THE COURT: Who did?

MR. MULLINS: The private investigator.

THE COURT: This fellow named?

MR. MULLINS: Jack Compton.

THE COURT: You mean you think he started, or you say he started following in you [sic] after the verdict or during your deliberations or when?

MR. MULLINS: I don't know when he started following us, and I'm not—this is hearsay.

THE COURT: I know.

MR. MULLINS: I'm repeating what Bill Jennings told me.

THE COURT: Who's Bill Jennings?

MR. MULLINS: He was the alternate.

THE COURT: All right.

MR. MULLINS: And, you know, Bill Jennings and I had lunch together every day for four and a half months

during the testimony, and we remain friends, too. He's been very interested.

THE COURT: Now, he says, Bill Jennings says that this fellow Compton talked to him?

MR. MULLINS: For two hours.

THE COURT: For two hours.

MR. MULLINS: Had all sorts of information. He said he also had been in contact with Catherine and Ruth, and I don't know if he approached them or vice versa, but I thought it was pretty interesting, one, that he had been following us, you know.

He alluded to some, well, just in continuation, that Bill Jennings and Tammy Albrecht were having an affair. He said, you know, you all rendezvoused out in the parking lot of Denny's, and then you'd change location and go someplace—well, you know, the restaurant was crowded and we went to El Mirador, and Joe and Tammy were with us, you know, and the guy knew that. He responded, well, yeah, I know that.

I don't know why he was disclosing all this to Bill, but he also had some other information too. Well, Catherine said this and Catherine said this, you know, about the various things that went on.

THE COURT: Compton said this to Jennings?

MR. MULLINS: Right.

THE COURT: All of this was supposed to have taken place during the trial or after the trial?

MR. MULLINS: Apparently, Compton started after the trial.

THE COURT: After the trial?

MR. MULLINS: Immediately after the trial. We went to lunch, the lunch he was describing is right after the verdict. We went over to Denny's, and then we went to El Mirador.

THE COURT: I see. Okay. Do you know of any—was there any—

MR. MULLINS: Incidentally, Judge Garcia—

THE COURT: —Go ahead.

MR. MULLINS: Jack Compton also had mentioned to Bill that he had been dealing with Ed Stewart also.

THE COURT: Who had?

MR. MULLINS: Jack Compton.

THE COURT: He, Compton, had been dealing with Ed Stewart.

MR. MULLINS: Yes.

THE COURT: Okay. Did Ed Stewart ever talk to you during the trial or—

MR. MULLINS: —During the trial, yes.

THE COURT About what? Just the time of day?

MR. MULLINS: Yeah, more or less. He told me that he was a bit of a firearms expert, and he told me some of his tails [sic] of traveling in the Far East, chitchat. It was just—

THE COURT: —Nothing about the trial?

MR. MULLINS: No.

THE COURT: Or the facts in the case?

MR. MULLINS: No, sir.

THE COURT: Did you know about any connection or an affair or whatever between Tammy and Dario?

MR. MULLINS: No. That's preposterous.

THE COURT: All right. Now, you mentioned earlier something about Kingsville. What was in Kingsville?

MR. MULLINS: Jack Compton indicated to Bill that he was a private investigator from Laredo hired by some men in Kingsville.

THE COURT: Did he mention the names of the people that hired him? Do you know?

MR. MULLINS: No, I don't know that.

THE COURT: Just people from Kingsville?

MR. MULLINS: That's what as I remember Bill as saying [sic]. I think he was telling us what he was—who he was hired to without saying anything.

THE COURT: All right. Now, aside from this fellow Compton that had given you—told you that his name was Crosby, is that right?

MR. MULLINS: Yes.

THE COURT: Have you been contacted by anyone other than the newspaper reporters since the verdict who you believe was a representative of the Plaintiffs or the Defendants?

MR. MULLINS: No, sir.

THE COURT: Anything else?

MR. PRIMOMO: No, sir.

THE COURT: That's all. Thank you very much.

MR. MULLINS: Okay.

THE COURT: I appreciate your coming down.

MR. MULLINS: All right.

THE COURT: Thank you ever so much.

MR. MULLINS: Thank you.

(Recess until 2:00 P.M.)

(Juror Catherine Broff enters the chambers)

THE COURT: Good to see you, Mrs. Broff. Please have a seat. Let me—I've got to swear you in.

(Juror sworn by the Court)

THE COURT: I'm going to ask you some questions about the Tesoro case, and this is not a criminal investigation. I'm not accusing you of any wrongdoing. I do not want you to tell me about your thought processes during deliberations

or what caused you to render your verdict. I just want you to answer the specific questions I will ask.

How do I pronounce your name, Broff?

MRS. BROFF: Broff.

THE COURT: What, if any, facts were discussed in the jury room during deliberations which did not come out in the courtroom during the trial? Do you know of any?

MRS. BROFF: Yes. Let me see. Okay. One was that if it was a hung jury, the Plaintiffs would have to pay for the trial.

THE COURT: What else?

MR. BROFF: Another one was if the Plaintiffs won, the stockholders now would have to pay. It would come out of the stockholders' money now.

THE COURT: What else?

MRS. BROFF: And that if they won, they'd get three times the amount of money that they had, you know, to give them.

THE COURT: What else?

MRS. BROFF: That Mrs. West was in a mental hospital and that she was well taken care of, and I don't know where they got that from.

THE COURT: Now, those were brought out in the courtroom? (sic)

MRS. BROFF: Yes.

THE COURT: Was this during the deliberations or during the trial?

MR. BROFF: During the deliberations.

THE COURT: Was it—how long was it discussed? For long time or just mentioned?

MRS. BROFF: No, just mentioned.

THE COURT: Just mentioned.

MRS. BROFF: Uh-huh.

THE COURT: These things you told me?

MRS. BROFF: Yes.

THE COURT: Okay. Now, other than the evidence concerning Dr. West's former wife being in the mental institution, did Mr. Mullins, as the foreman, discuss other extraneous matters or did he direct the jury's attention to the evidence introduced at the trial?

MRS. BROFF: What do you mean by that?

THE COURT: Other than the evidence concerning Dr. West's wife being in a mental institution, did Mr. Mullins, as the foreman, discuss other extraneous matters other than the ones you've just mentioned to me?

MRS. BROFF: Let me see, I've got some notes. (Looking in purse) Not that I can remember.

THE COURT: Okay. Did he—talking about Mr. Mullins the foreman—did he direct the jury's attention to the evidence introduced at the trial?

MRS. BROFF: No, he just—well, yes, evidence at the trial, but he would not let us use the testimony, you know he said that wasn't the evidence. It was the evidence that was presented that we had to use.

THE COURT: Okay. At the trial?

MRS. BROFF: Yes.

THE COURT: Any other extraneous facts, other than the ones you just mentioned to me that you know about?

MRS. BROFF: No.

THE COURT: Okay. Did you ever talk to any court security officers or other court personnel concerning the facts of the case?

MRS. BROFF: No.

THE COURT: Okay. Were you contacted by anyone during the trial or deliberations who you believe was a representative of the Plaintiffs or the Defendants?

MRS. BROFF: No.

THE COURT: Have you been contacted by anyone since the verdict who you believe was a representative of the Plaintiffs or the Defendants? Not the newspaper people, but anyone since the verdict who you believe was a representative of the Plaintiffs or the Defendants?

MRS. BROFF: Well, a man did contact me, but he works for an attorney, Sharp, in Kingsville. He is not a representative for the Plaintiffs.

THE COURT: What is his name, do you remember?

MRS. BROFF: Jack Compton.

THE COURT: When did he call you?

MRS. BROFF: Oh, he didn't call me. He had got ahold of Ruth Jones, and she called and asked me if I had talk [sic] to him. I got ahold of him, I called him.

THE COURT: You called him. This was all on the telephone?

MRS. BROFF: No, I met him.

THE COURT: Okay. What did he say? Just asked you what?

MRS. BROFF: Asked me questions similar to what you're asking? [sic]

THE COURT: How long ago was that? Right after the verdict?

MRS. BROFF: No, not right after. It was after—it was after over a month, over a month after the verdict, maybe two months.

THE COURT: Okay. Well, do you remember what was said?

MRS. BROFF: No. Like I said, he just asked me about the same things, you know, we talked about the same things that you're asking me.

THE COURT: Did you tell him what you told me?

MRS. BROFF: Yes.

THE COURT: Anything you have?

MR. PRIMOMO: I'd ask the question concerning any of the security officers, contacting them.

THE COURT: I did. Did you contact any of the security officers?

MRS. BROFF: What, during the trial?

THE COURT: Yes.

MRS. BROFF: Yes, I told the security officer about, I asked him if during the trial, you know, were we supposed to talk to the security officers, and he said no.

Because Tammy would go out there every day and talk to one of the security people, so that's why I thought maybe a security officer was leading her on towards the Tesoro side because she knew about Dr. West's wife, and unless she knew Dr. West, how would anybody know about that situation?

THE COURT: Okay.

MR. BROFF: So I told him, and I don't know who he went and told, but I don't know what was said.

THE COURT: Do you know who the security officer was that you talked to?

MRS. BROFF: I don't know any of their names.

THE COURT: Okay. Was he out here?

MRS. BROFF: Yes, he was right by the door when we came in. He was at our door.

THE COURT: So you went and asked him if you were supposed to be talking to any—if you were supposed to be talking to the security people?

MRS. BROFF: Right. And she talked to him just about every day after we'd come back from lunch.

THE COURT: Okay. And the information, the extraneous matters, if any, that came in had to do with Dr. West's wife?

MRS. BROFF: Right. Now, I don't know how she would have found that out. I thought, you know, he might have told her, and so I told the security guard.

I also had asked Mullins to write a note for me to see you and he never would.

THE COURT: Okay. Did he—did she say, I'm talking about Tammy—what's her last name?

MR. PRIMOMO: Albrecht.

THE COURT: Albrecht. Did she have or do you know of any other information other than Dr. West's former wife?

MRS. BROFF: No, I don't recall.

THE COURT: Other extraneous matters?

MRS. BROFF: No.

THE COURT: Okay. Anything else?

MR. PRIMOMO: Did you know at the time you talked to Compton that he was a representative of the Plaintiffs?

MR. BROFF: No, he said he was—worked for an attorney.

THE COURT: I believe you said an attorney named Sharp?

MRS. BROFF: Sharp, yeah.

THE COURT: Out of—

MRS. BROFF: —Kingsville.

THE COURT: Kingsville. Anything?

MR. PRIMOMO: No.

THE COURT: Okay, Mrs. Broff. Thank you very, very much. Thank you so much for taking time to come in here.

MRS. BROFF: Okay.

(Juror Catherine Broff exits the chambers and Juror Gloria Ochoa is brought into the chambers)

THE COURT: Hello, Mrs. Ochoa, how are you?

MRS. OCHOA: Fine, thank you.

THE COURT: Would you please raise your right hand and be sworn?

(Juror sworn by the Court)

THE COURT: All right, please have a seat. Mrs. Ochoa, I'm going to ask you some questions about the Tesoro case, and this is not a criminal investigation, and I'm not accusing you of any wrongdoing. I do not want to know, I do not want you to tell me about your thought processes during deliberations or what caused you to render your verdict. I just want you to answer the specific questions I'm going to ask you.

Now, Mrs. Ochoa, what, if any, facts were discussed in the jury room during deliberations which did not come out in the courtroom during the trial? Do you remember any?

MRS. OCHOA: What we discussed?

THE COURT: What, if any, facts were discussed in the jury room during the deliberations which did not come out in the courtroom during the trial?

MRS. OCHOA: None.

THE COURT: Okay. Now, there was some talk, I believe, in deliberations about Dr. West's former wife being in a mental institution, do you remember that?

MRS. OCHOA: No, I heard it after the trial was over. Somebody asked me. I don't know. I didn't hear anything about that.

THE COURT: During deliberations, you heard nothing about that?

MRS. OCHOA: No.

THE COURT: Or about any other extraneous matters, other matters that were not brought out in the courtroom during the trial?

MRS. OCHOA: No.

THE COURT: Okay. Mr. Mullins was the foreman, right?

MRS. OCHOA: Yes.

THE COURT: All right. Did Mr. Mullins direct the jury's attention to the evidence introduced at the trial? Did he tell you to discuss—told the jury to discuss the matters that were brought out during the trial, the evidence?

MRS. OCHOA: No, if anyone was to use the—I mean, we looked for the papers.

THE COURT: Uh-huh.

MRS. OCHOA: Right. But if we find something for the Plaintiffs, he gave us another answer.

THE COURT: Uh-huh.

MR. MULLINS [sic]: He said, no, that's not why, that's because of this and because of that.

THE COURT: All right.

MRS. OCHOA: And we always had to agree with him. At the end, we had to agree with him.

THE COURT: Why?

MRS. OCHOA: Because his character was very strong. I'm speaking for myself.

THE COURT: Uh-huh.

MRS. OCHOA: I'm not the type of person that likes to argue.

THE COURT: Uh-huh.

MRS. OCHOA: The first day we were looking for evidence, see, something so we won't forget. The next day he told us, I'm very mad and at you, too, Gloria, because you were looking for papers that we didn't even need at the time-being. But he looks mad—that was it for me. Then I just got along with him.

THE COURT: Okay. Did you ever, did you talk to any court security officers or other court personnel concerning the facts of the case?

MRS. OCHOA: No.

THE COURT: Were you contacted by anyone during the trial or during the deliberations who you believe was a representative of the Plaintiffs or the Defendants?

MRS. OCHOA: No, sir.

THE COURT: Have you been contacted by anyone since the verdict who you believe was a representative of the Plaintiffs or the Defendants? Not the newspaper reporters, but anyone else?

MRS. OCHOA: Just the private investigator.

THE COURT: Do you remember his name?

MRS. OCHOA: It's Compton or something like that.

THE COURT: Compton. All right. When did he contact you? Do you remember?

MRS. OCHOA: I don't remember the date.

THE COURT: Okay. But it was after the trial?

MRS. OCHOA: Yes.

THE COURT: Was it a few days or a couple of weeks after the trial?

MRS. OCHOA: I think it was a week, but I don't know how many weeks? [sic]

THE COURT: What did he say?

MRS. OCHOA: No, he just wondered what was brought up in the jury, how we came out, how we came out with the decision. That's all.

THE COURT: That's all?

MRS. OCHOA: Uh-huh.

THE COURT: Now, the security people, they didn't contact you or you contact them?

MRS. OCHOA: No, sir.

THE COURT: Anything else?

MR. PRIMOMO: Who did Mr. Compton say he worked for?

MRS. OCHOA: No, he said—let me see. He didn't say that he contacted by the Plaintiffs [sic]. It was somebody else that asked him to investigate.

THE COURT: Was it somebody named Sharp?—

MRS. OCHOA: I don't remember.

THE COURT: Okay. That asked him to investigate, that's what he said to you?

MRS. OCHOA: Yes.

THE COURT: Anything else?

MR. PRIMOMO: No.

THE COURT: Okay. Thank you, Mrs. Ochoa, very much. You may be excused.

MRS. OCHOA: Okay.

THE COURT: Thank you.

(Mrs. Ochoa removed from the chambers and Juror Nancy Torres brought into the chambers)

THE COURT: How are you, Mrs. Torres?

MRS. TORRES: Fine.

THE COURT: Would you raise your right hand so I can swear you in?

(Juror sworn by the Court)

THE COURT: Please be seated. I'm going to ask you some questions about the Tesoro case, and this is not a criminal investigation and I'm not accusing you of any wrongdoing. I do not want you tell me about your thought processes during your deliberations or what caused you to render your verdict. I just want you to answer the specific questions I will ask.

Now, what, if any, facts were discussed in the jury room during the deliberations which did not come out in the courtroom during the trial? Do you know of any?

MRS. TORRES: Yes.

THE COURT: What was that?

MRS. TORRES: Questions?

THE COURT: No. Whether any facts were discussed in the jury room during the deliberations which did not come out in the courtroom during the trial?

MRS. TORRES: Okay. About Dr. West's wife and of how things were going around, things were already happening in other places and other—the White House and things like that.

THE COURT: The White House?

MRS. TORRES: Yes. Well, I can't remember.

THE COURT: During your deliberations, someone mentioned something about Dr. West's former wife, is that right?

MRS. TORRES: Yes.

THE COURT: Now, aside from that information, do you know of any other information that was brought out during deliberations?

MRS. TORRES: Yes, but I can't remember.

THE COURT: That didn't come out in the courtroom?

MRS. TORRES: No.

THE COURT: Okay. When I use the term extraneous facts, do you know what I mean? Something other than what occurred in the courtroom, do you know what I mean? Information that was given to you or brought into the jury room that did not occur in the courtroom?

MRS. TORRES: Uh-huh.

THE COURT: The testimony in the courtroom, besides that?

MRS. TORRES: Yes.

THE COURT: Okay. Did Mr. Mullins—I know that there was mention made of Dr. West's former wife—

MRS. TORRES: —Uh-huh.

THE COURT: —being in a mental institution or something like that, right?

MRS. TORRES: Okay. Something about Rosen and Mr. Miller having things settled, getting things settled, and Mr. Miller had told Rosen that—oh, no, or Rosen, one or the other, said why don't you pay the ex-shareholders what you owe them and then we'll drop this whole thing, and Mr. Miller said no.

THE COURT: When was this?

MRS. TORRES: During our jury duty.

THE COURT: During the trial?

MRS. TORRES: Uh-huh.

THE COURT: Or during the deliberations?

MRS. TORRES: Deliberations.

THE COURT: Deliberations. And who said this?

MRS. TORRES: Mullins.

THE COURT: Mullins said this?

MRS. TORRES: But then he said let's not talk about it because we're not supposed to talk about things like that.

THE COURT: That's what Mr. Mullins said?

MRS. TORRES: Uh-huh. He said we're supposed to look at the evidence.

THE COURT: Is that what he said?

MRS. TORRES: Uh-huh.

THE COURT: So this that you just told me about was mentioned only once?

MRS. TORRES: Once, uh-huh. Just—I guess we were arguing about something, and so he brought that up, and then we just stared at him, and so we just kept on reading.

THE COURT: All right. And he said let's not talk about that, or whatever?

MRS. TORRES: Uh-huh. Let's not talk about that. We're not supposed to talk about that.

THE COURT: Okay. So that he, Mr. Mullins, as foreman, directed the jury's attention to the evidence introduced at the trial?

MRS. TORRES: Uh-huh.

THE COURT: Is that right?

MRS. TORRES: Yes. I guess he read it in the newspaper or something because that's where he said that—or someone told him, I don't know, but he said we're not supposed to talk about that.

THE COURT: He said you're not supposed to talk about it?

MRS. TORRES: Uh-huh.

THE COURT: All right. And did anybody else talk about it?

MRS. TORRES: No, we didn't, because—

THE COURT: —Okay. Did you ever talk to any court security officers or other court personnel concerning the facts of the case?

MRS. TORRES: No.

THE COURT: Other than the jurors. I mean, other court security officers—

MRS. TORRES: —About the case?

THE COURT: Yes?

MRS. TORRES: No.

THE COURT: Okay. Were you contacted by anyone during the trial or during the deliberations who you believed was a representative of the Plaintiffs or the Defendants?

MRS. TORRES: No.

THE COURT: All right. Have you been contacted by anyone since the verdict who you believe was a representative of the Plaintiffs or the Defendants?

MRS. TORRES: I think it was—what was his name—by the Plaintiffs, an investigator.

THE COURT: An investigator?

MRS. TORRES: Yeah, but Catherine called me and told me to call the investigator because he wanted to ask some questions.

THE COURT: Who is Catherine?

MRS. TORRES: Catherine Broff.

THE COURT: Okay.

MRS. TORRES: And I said, tell him to call me at work, and she said, no, he can't call you, so you have to call him. So I went ahead and called him, and he was just asking me questions.

THE COURT: Was that—did he say he worked for the Plaintiffs?

MRS. TORRES: He was an investigator for the Plaintiffs, uh-huh.

THE COURT: This felow by the name of Compton or something?

MRS. TORRES: Yes, Jack Compton.

THE COURT: Did he—how soon after the trial did he contact you or you contacted him?

MRS. TORRES: It was still very hot—September, August—about September, August or September.

THE COURT: Okay. You only talked to him once?

MRS. TORRES: Uh-huh.

THE COURT: You don't remember what was said?

MRS. TORRES: Just questions about Mullins and if I knew that Mullins' father or Dr. West was on the board of Mullins' father at the research thing, that he knew about it. I said, no, I didn't know that.

And that if I knew he was, if he had gotten a loan or something like that, and I said, no, I didn't know that. Just small questions, like the loan.

THE COURT: You didn't know about that?

MRS. TORRES: No, I didn't.

THE COURT: You didn't even know if it happened at all?

MRS. TORRES: No.

THE COURT: Anything else?

MR. PRIMOMO: (Indicating negative)

THE COURT: Mrs. Torres, thank you very, very much for being with us. You are now excused.

MRS. TORRES: Thank you.

THE COURT: Thank you very much.

MRS. TORRES: Is this the last time?

THE COURT: This is the last time you'll be bothered by us.

(Hearing concluded at 2:57 P.M.)

* * * * *

APPENDIX B

THE HEARING ON PETITIONERS' MOTION FOR NEW TRIAL

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ROBERT J. BOLTON, *et al.*,

Plaintiffs,

VERSUS

TESORO PETROLEUM CORPORATION, *et al.*,

Defendants.

Docket No. SA-82-CA-824
Docket No. SA-82-CA-825

ROBERT J. BOLTON,

Plaintiff,

VERSUS

ROBERT V. WEST, *et al.*,

Defendants.

San Antonio, Texas
November 6, 1987

STATEMENT OF FACTS

BEFORE THE HONORABLE H. F. "HIPPO" GARCIA, and a jury.

VOLUME NO. 156
(PAGES A4599-A4630)

THE COURT: Please be seated. All right. Mr. Rosen, will you stand by so we can record you? (Pause)

All right, Mr. Rosen, as the Plaintiff, filed a motion for a new trial in the matter and filed a supplement to the motion for a new trial. Now, we're here today on the Plaintiffs' motions and there is no need to hear evidence on the allegations in the original motion, only on the supplement.

Now, having interviewed, Mr. Rosen, all of the jurors individually yesterday, I have a good idea of what happened. I also understand, am I correct in this, that you have received a transcript of the interview?

MR. ROSEN: Yes, Your Honor; I have.

THE COURT: Okay. Now, because the jurors' testimony was consistent on the essential issues, you will have to tell me, Mr. Rosen, what evidence to the contrary you have before I allow any further testimony. I will not allow a fishing expedition.

On the issue of Mr. Mullins' alleged conflict of interest because of his father's and girl friend's ties to the Southwest Research, he testifies he did not know until after the trial that Mr. West, Mr. Bonner, and Mr. Frost were on the board of trustees.

Now, my question to you is do you have any evidence that would contradict this?

MR. ROSEN: Your Honor, with respect to whether the Defendants West, Bonner, and Frost were members of the board of trustees is not the single basis for the conflict of interest. There was testimony in the case which we submitted to the Court.

THE COURT: I'm familiar with that, sir, about Mr. West's—Dr. West's testimony?

MR. ROSEN: Yes, Your Honor.

THE COURT: All right.

MR. ROSEN: It is our position Dr. West testified at great length about his relationship with Mr. Slick and Southwest

Research. We supplied to the Court, pages 700 through 705, A700 through A705 regarding the numerous times Southwest Research was mentioned.

THE COURT: That's right.

MR. ROSEN: At the moment that Southwest Research was mentioned, at that moment in time, Mr. Mullins' father was an employee of Southwest Research for over thirty-one years.

THE COURT: Yes, I know that.

MR. ROSEN: At that moment in time, his girl friend that he was living with had interviewed at Southwest Research for a job. We had asked the Court to ask the jurors whether or not Mr. Mullins during the trial or deliberations that his girl friend had in fact obtained a job overseas [sic]. It is our understanding that he made such an announcement in the jury room and did not disclose Southwest Research was the employer.

The Court did not ask that question of any juror. However, we are aware that that did in fact happen. We are also aware that he would have been obligated to disclose to the Court the moment Southwest Research's name was mentioned, his father's relationship and the woman he was living with relationship with Southwest Research.

Regardless of the fact of West, Bonner, and Frost were in fact trustees, the fact that West had a relationship with Slick and Southwest Research was disclosed during the trial.

THE COURT: Mr. Rosen, according to the transcript of the record that you've submitted to the Court, the conversations during the trial with Dr. West concerning his connection with Tom Slick and Southwest Research occurred many, many years ago.

MR. ROSEN: Your Honor, the fact of the matter is that Tesoro—we have requested Southwest Research to produce documents here today which would show the continuing relationship between Tesoro and Southwest Research.

THE COURT: I'm not going to allow that, sir.

MR. ROSEN: I understand that, Your Honor, but may I at least offer my proof?

THE COURT: No, sir. Let me go on with this first. Regarding extraneous evidence, the jury has testified that the only extraneous fact which came out during deliberations that did not come out during the trial concerned Dr. West's first wife and whether or not she was committed to some institution.

Now, do you have evidence that any other extraneous facts came to their attention?

MR. ROSEN: Yes, Your Honor; I do.

THE COURT: What is that.

MR. ROSEN: Well, with due respect, I do have—I read the transcript last night, and it was my understanding that Mrs. Broff not only mentioned the mental hospital, but she also mentioned that damages were trebled. Accordingly, and I'll point the Court to the page, the Court asked Mrs. Broff at page A4580, and Mrs. Broff then mentioned a number of matters that were extraneous that were in the jury room.

She mentioned the following, "That if it was a hung jury, the Plaintiffs would have to pay for the trial." Page A4580. That is a fact that was not in any form before the Court or anything in the trial, and it was a fact that Mr. Mullins set forth. In response to a question by the Court, Mrs. Broff said that that was in the jury room.

Another one, the Court said, "What else?" On page 4580, and Mrs. Broff said, "And that if they won," being the Plaintiff, "they'd get three times the amount of money that they had, you know, to give them." That is the RICO treble damage that was not brought out during the trial that Mrs. Broff set forth to the Court. Another one, of course, Your Honor, was the mental hospital.

Mrs. Torres, Your Honor, mentioned that Mr. Mullins said something about Mr. Miller and myself on page 4593,

something about, "Mr. Rosen and Mr. Miller having things settled, things getting settled, and Mr. Miller told Rosen that, oh, no, or Rosen, one or the other said, why don't you pay the ex-shareholders," and I use the word ex-shareholders, "what you owe them and we'll drop this whole thing, and Mr. Miller said no."

Your Honor, that information of a conversation between Mr. Miller and myself regarding that particular point was nowhere in the trial, and it was in Mr. Mullins and in the jury room. I'm only pointing these out by example, Your Honor, that there is more than just a mental institution here that was before this jury with respect to facts.

THE COURT: Mr. Rosen—

MR. ROSEN: —If I may go on, I'll tell the Court some more.

THE COURT: No, I want to tell you this that I feel that internal jury deliberations are one thing, and it is not an external matter that could compromise the verdict. Speculation on the part of juror or jurors as to insurance, or who is going to pay the cost, or the business of treble damages that you mentioned, in my opinion, that is intra-jury matters and cannot form the basis for a new trial.

MR. ROSEN: Your Honor, you asked me what extraneous information was within the jury, and I started to point it out to you. What the Court determines with respect to the impact of that extraneous evidence, you didn't ask me to comment on.

However, I'd like to continue, if I may, with respect to other matters. We had submitted to the Court a letter asking the Court at the bare minimum to ask certain questions of certain jurors. Had the Court asked these questions which was submitted to the Court before these three jurors had been interviewed in the afternoon, and I don't know whether or not it was submitted to the Court before Mr. Mullins had been interviewed, but it's my understanding it was received by the Court close to 10:00 A.M. and that—I can't tell from the transcript who was interviewed by 10:00 A.M. or not, but

it is our understanding that Mr. Mullins and three jurors in the afternoon may not have been interviewed at the time this letter was delivered.

I know that the three jurors in the afternoon could not have been interviewed because they started at 2:00. I don't know whether or not the Court had the letter at the time that Mr. Mullins was interviewed. It is our understanding the Court did because when Mr. Dugan delivered it, Mr. Mullins was in the court outside room [sic] which I understood was waiting to be interviewed. That was my understanding, but I may be totally wrong on that. I don't have those fact [sic].

We ask the Court on B to ask, "Was there an incident involving Sybil West, Robert West, and a gun?" We have information that can only be confirmed by a question to the jury if it was asked that jurors told Steve Fraser at the Wall Street Journal that there was—that Mr. Mullins pointed out in the courtroom—or Tammy pointed out in the deliberation room—I'm sorry. Mr. Mullins in the deliberation rooms or Tammy in the deliberation room, that Dr. West's wife had a gun and showed it to Dr. West. In some form there was a gun involved while they were talking about the Bates testimony or the Bates incident.

The reason I know this is Mr. Fraser called me on the phone and asked me if any gun incident came out during the trial because he heard of a gun incident in the jury room by a juror. That is the reason I asked the Court to ask the jurors that question. It is my position that had the Court asked that question, the Court would have been told that did in fact take place.

The Court saw fit not to ask that question, but it is part of our case, Your Honor, that that was extraneous evidence in the jury room, and that the mental hospital, the RICO damages, and the—I'm sorry, the trebling of the RICO damages, facts about Mr. Miller and myself, and this gun incident all were in the jury room that shouldn't have been in the jury room.

In addition, Your Honor, we ask the Court to ask the jurors the following question. "Did you observe any conduct

you thought was improper to the verdict?" Had the Court asked that question, we are under the belief that the jurors would have told you that when the verdict was announced at the bench and they left the courtroom, the bailiffs, the court security officers separated the jurors into Tammy and Mullins to talk to the press and ushered other jurors away so the press couldn't talk to them.

That would have been responded to had the Court inquired into that as to conduct. Those jurors have brought that to the attention to the press who have called and asked me about that as to whether or not I was aware of that, that Marshals had knowledge in the jury room of what was going into the jury room and the position of who was for Tesoro and who was not, principally.

In addition, Your Honor, it is our position that there was other facts about the relationship between Mr. Mullins and his father that was discussed during the trial and with respect to a loan his father gave him and his father is an employee of Southwest Research. We believe, Your Honor, that Mr. Mullins, had he announced to the Court his conflict of interest, the Court would have attended to it at that particular moment.

Had the Court asked the question, "Did you observe any conduct you thought was improper prior to the verdict, or did other facts or information that were not released in the courtroom during the trial come to your attention prior to your verdict, and if so, who brought them out," it is our position that the Court would have been told of additional facts that we have been told through the press.

Your Honor, we did not talk to the jurors. The only way we learned as to what the jurors had as far as information is when the members of the press called us for confirmation of those facts, did they come up or not come up during the trial. Since we are precluded from talking to the jurors, the only facts we had is what we learned in the newspapers.

That's why we prepared this list of questions that we thought the Court should ask. We know the Court did not

ask them, and we feel prejudiced by that, and if you ask me what more I can put on, I could ask the Court to permit me, with Mr. Primomo and the Court present and counsel present, to ask certain questions that are on this list that the Court didn't ask, and I believe the Court would find other extraneous matters that were outside of the jury room, or dealt with, with the jury in the jury room, that form a part of their verdict—Violation 06 [sic] with respect to extraneous prejudicial information improperly before the jury.

THE COURT: Mr. Rosen, in my questioning of the jurors yesterday, each one of the jurors was asked if they knew of any extraneous matters. other than the ones that we have talked about, and they replied "no."

I asked them if they contacted anyone outside of jury, that is court personnel or security people or anyone in connection with the facts in this case, and they said "no."

Or had anyone attempted to contact them or had in fact contacted them during the trial or during the deliberations concerning the facts in this case, and they all answered "no." They talked to some of the security personnel or the security people in conversations, but not about the facts of the case.

MR. ROSEN: Mrs. Broff testified, Your Honor, on page A8503, in response to your—I'm sorry. Page 584 and 85 that Mrs. Broff contacted a security officer and made a report or a complaint that there was improper information in the jury room with Tammy, and that she told—

MR. MILLER: —I didn't read that.

MR. ROSEN: Page A4584 and 4585. And I intend to put information, evidence in the record today that that complaint was in fact made to a security guard.

THE COURT: She said that it was. She said that she went to a security officer and made some kind of complaint. She testified to that.

MR. ROSEN: She made a—and, Your Honor, that complaint that Broff made that Tammy had information that she

shouldn't have in the jury room, that complaint was never told to the Court, as I understand it.

THE COURT: That's right, it was never told to the Court.

MR ROSEN: Yet the complaint was made to a security guard, and we will put on evidence today that that complaint was made five to six days before the verdict, and that the complaint was made to a security guard, and we have the testimony of somebody that saw the complaint made, heard the complaint immediately after it was made, understood that the complaint was reported to the supervisors and the court security officer, but yet never delivered to the Court.

If that complaint was made, Your Honor, and the complaint came to your attention before the verdict had been announced, the Court would have acted on that complaint to see what information was in the jury room before verdict.

THE COURT: I think we know what information was in the jury room from talking to the jurors now, Mr. Rosen.

MR. ROSEN: You are asking the jurors now, in November, for what was in the jury room in July. We were entitled in July to have that information by virtue of that complaint, if the Court will follow my reasoning.

A juror makes a complaint, calls a security officer because Mrs. Broff said that Mr. Mullins wouldn't write a note to you about this. She said that on page 485. "I had asked Mullins to write a note for me to see you, and he never would."

So that Mr. Mullins doesn't write a note, and Mrs. Broff then goes to a security guard and tells the security guard that Tammy has information she shouldn't have in the deliberation room that isn't part of the evidence of the case. The security guard gets that, and instead of honoring his duty by reporting it to the Court, it is covered. It is disappeared.

THE COURT: Mr. Rosen, how would that compromise the verdict?

MR. ROSEN: Because if the Court had heard that message, the Court would have investigated it then, Your Honor,

and would have learned at that point in time, at that moment in time, that there was evidence in that jury room that they shouldn't be considering.

THE COURT: The matters that was brought before the jury room, we know about matter [sic]. It was the matter about Dr. West's wife being in the insane asylum or wherever she was, in an institution.

MR. ROSEN: Your Honor, that is what jurors are telling you five months later, four months later.

THE COURT: Mr. Rosen, we can speculate on all of that.

MR. ROSEN: Your Honor, but what I'm asking the Court is if we come into a federal courthouse, and court security officers, deputized court security officers receive a complaint from a juror five days to a week before the verdict is announced that improper information is in the jury room, and they ask the juror—and they ask a court officer for help from you and they don't get it, they are left in that jury room to believe that that information in there is permissible.

They are led to believe that you got that message and didn't act on it, and they are sitting in there with that information that you know is going on and are permitting them to have it.

THE COURT: I think you will read in the transcript that the juror said that Mr. Mullins—that their attention was called away from matters that came up when they talked about insurance, or talked who was going to pay the cost, they talked about Dr. West's first wife, that this always moved away from that and back to the issue at hand while they were deliberating. Sure, there were a lot of conversations back and forth, but that is intra-jury matters and has nothing to do with the verdict.

MR. ROSEN: Your Honor, I can only ask you one question. Had you been told, Your Honor, five days before the verdict was announced that a juror was complaining that there was improper information in the jury room at that

moment in time, would the Court have, on its own, inquired as to what it was while it was fresh in every juror's mind what was going on at that moment in time?

And I know that your answer is yes. The Plaintiffs would have been advised and the Court would have been advised. At that moment in time, the Court would have found out what it couldn't inquire into today, one, that jurors were being coerced into a verdict by Mullins, which you can't inquire into today according to your position in your questions. I see that you didn't ask any of those questions, but you could have inquired at that time. All of the jurors would have told you that at that point in time.

They would have also told you at that point in time that Mullins and Tammy were predetermined for Tesoro. They would have told you at that time about Tammy being seen—

THE COURT: —Mr. Rosen, you're telling me what they could have told me. I understand that all of that, Mr. Rosen, but what evidence can you give me now in addition to what's already been in the questioning of the jurors yesterday and that information about extraneous matters that were brought into the jury room.

MR. ROSEN: I can give you evidence today that jurors were in fact coerced into a verdict.

THE COURT: Mr. Rosen, that has nothing to do with this.

MR. ROSEN: Your Honor, the fact of the matter is that I have to present my evidence as to what you would have learned if the Marshal's Office didn't cover up that message.

THE COURT: Mr. Rosen, I disagree with you. That has nothing to do with a new trial.

MR. ROSEN: Your Honor, if the Court—if the system—

THE COURT: —The mental processes of the jury during their deliberations has nothing to do with this.

MR. ROSEN: Your Honor—

THE COURT: —We can't even inquire into that under the cases.

MR. ROSEN: Your Honor, that's because we inquire after verdict. If the Court is told of a complaint by a juror before a verdict is announced, the Court isn't bound not to inquire what's going on then. The Court has full right to inquire everything that is going on before the verdict is announced.

What has happened here is that the jurors make a complaint to the Marshal's Office, the Marshal's Officer, and we're prepared to put in testimony today, covered that message and never disclosed it to the Court, the complaint by that juror. The Marshal's Office also had knowledge, Your Honor, of a second complaint that Tammy and another Marshal, Dario Guerrera (sic), were seen outside of the courthouse together, outside of the courthouse.

THE COURT: Mr. Rosen, in your supplement to the motion to—Plaintiff's motion for a new trial, you allege a romantic involvement, and I have inquired into that, and that is certainly not true and I do not believe it.

MR. ROSEN: Your Honor, may I point out that had the Court asked—the Court did not ask any of the jurors about Tammy and Guerrera. The Court didn't ask. Had Court the asked Nancy Torres, we are told, and, Your Honor, of course, we can only be told what the jurors told others at another time, people that—we haven't talked to the jurors, we can only be told that. But Nancy Torres would have told the Court of conversations she overheard with Tammy and Guerrera which would have shown the intimacy of that relationship.

The Court didn't inquire. The Court didn't ask any jurors anything. It only asked Tammy, did it go on? We can show the Court that the juror Tammy and Guerrera were seen outside of the courtroom together, outside of the courthouse together, and they were seen over and over having conversations, when the oath of office of the court security officers forbids any type of contact.

Your Honor, had you been told that, you would have acted. What I'm saying to the Court is that the Court is putting a burden on Plaintiffs to prove after the verdict the extraneous evidence, when it's a system that is designed to protect the Plaintiffs was in force and not compromised—

THE COURT: —You're using that as a grounds for a new trial?

MR. ROSEN: Yes, Your Honor.

THE COURT: I disagree with you, sir.

MR. ROSEN: Your Honor, may I put on the evidence of the Marshals who have testified to a report given by a juror five days before the—at least five days before the verdict, a com—

THE COURT: I know about that, sir.

MR. ROSEN: Your Honor, we also tried to talk to U.S. Attorney Speck, a Wayne Speck, and we're told that under instructions from you, he was not permitted to talk to us.

THE COURT: That's right.

MR. ROSEN: We know that Speck, Wayne Speck has the tape or the transcription of the meeting between Mr. Stewart, the court security officer, and a Mr. Compton, and an FBI agent where he disclosed what we are told are the following facts, that a Bob Lyon (phonetic) and Earl Howell, both court security officers, talked about what Guerrera was doing with Tammy. That a Mr. Jim Bob Brown told Stewart that he would only tell Your Honor about these incidents if Tesoro lost the case.

That a Mr. Dick Boone saw Dario and Tammy together outside of the courthouse, and that the jury was in deliberations when Dario and Tammy were together, as well as before the time they were in deliberations. And that while the jury was deliberating, Dario was talked to by the Marshal's Office with respect to the relationship with Tammy.

We also were told that an incident report of this exact nature, both the complaint by Mrs. Broff that there was

outside information in the jury room with Tammy, together with Dario's relationship with Tammy, should have been on an incident report in the Marshal's Office. We are not permitted by talking with Mr. Speck—by not being able to talk to Mr. Speck, we are not even able to know if such a report does in fact exist.

We are further told by Mr. Stewart that he was told by two court security officers that a meeting took place between Poindexter, which is Mr. Lyon's supervisor. Mr. Lyon is the gentleman who the complaint made to [sic]. And the Court, when speaking to Mrs. Broff, as the Court asked Mrs. Broff, she said she was unable to tell you the court officer's name who she made the report to. Had the Court asked Mrs. Broff to describe him, Mrs. Broff—and/or asked Nancy Torres to describe him, he would have been described as a red-headed bailiff.

Mr. Stewart is prepared to testify that Mr. Lyon and/or Mr. Boone were the jurors (sic) where that report was made that he saw it happen, and we know that Mr. Lyon is the red-headed gentleman Mrs. Broff was referring to.

THE COURT: What you're tell me is those, in your opinion, are grounds for a new trial?

MR. ROSEN: My position, Your Honor, is that I—I haven't finished laying out my grounds, but let me finish laying them and then I will tell you.

That Mr. Lyon and/or Mr. Boone reported the complaint to Mr. Poindexter to make certain that it goes to you, that it would be going to you. There was a meeting between Poindexter, Tony Rutledge, another deputy, and a Robert Steele who is the head of the deputies that made the report, and Mr. Guerrera was brought into that particular meeting. And there was a discussion on both their relationship and the complaint, and nothing happened and you were weren't told.

And Mr. Stewart would then testify that the jury was waiting for, quote, "sparks to fly" when you did find out because you would have investigated it, and when he saw that the jury verdict came in and there was no investigation

and there was nothing done with respect to that report, he knew there was a cover-up, and he tried to sell that cover-up to the Plaintiffs, that it existed in the Marshal's Office. And that's how Mr. Stewart ended up pleading guilty to that particular conduct.

But he will testify to this Court that he knows about the incident, knows about their [sic] being no investigation, believing there was a cover-up in the Marshal's Office, and had it been reported to the Court, it was such a significant report, that the Court would have acted on it.

It is our position, Your Honor, that you cannot look at our motion for new trial based on the facts that we are bound by after verdict, when in fact had the system here to protect the Plaintiffs worked, and the Marshals done their duty, that report would have been given to you, and you would have protected the Plaintiffs.

We ask no less protection of you now than you would have given us before the verdict. Had you brought that to our attention at that time, you would have investigated and found out a whole litany of coercion in that jury room, of information that was in there, some of which I've mentioned today. You would have found out about the relationship with Tammy, and you would have acted and protected the Plaintiffs.

We ask no less protection from you today than you would have given us then. You are putting a burden on us today to come forward with information that we're not allowed to give you because the verdict has been rendered, and the rules say after verdict has been rendered, we're only allowed to point out extraneous evidence in the jury room.

However, we shouldn't be under that criteria. The criteria we should be under is what you would have done to protect the Plaintiffs if the Marshal's Office hadn't covered up the verdict—I'm sorry, the complaint. Your Honor, why they covered it up, who's involved in the cover-up isn't part of my case before Your Honor. That's before a grand jury and an investigation. I'm not here on that.

I can only tell you that there was a cover-up in the Marshal's Office of that report. You didn't get it. Had you gotten it, you would have protected us, and I ask you for that protection. Our grounds for our new trial isn't based on what we have to show you after verdict. It's based on what you should have been told had there not been conduct that deprived the Plaintiffs of this, which conduct is a violation of the oaths of office of the Marshals, and a violation of their duties.

We a right [sic] in this courtroom to be protected against that, and we have a right in this courtroom coming into federal court to believe that when a juror gives a complaint of that significance to a Marshal, that that Marshal is turning around and giving it to you and is not burying it. And had we known about it, we would have been protected.

And we're asking as part of our motion, that the equity of this Court protect us against that conduct. We didn't commit that conduct. We were not part of that conduct. That conduct happened in this city, in this Marshal's Office, and you didn't have that information.

I know, Your Honor, I dealt in this courtroom with you for seven months, I know and I've seen your temper. I know that if that report had come in to you that everything would have been investigated, and we would have had a fair trial, and that information would have been excluded from that jury room and so would the people. And I would have been given my mistrial on the spot then, and I ask you for no less now.

And what you are asking me to do is to come in after verdict with the information to show outside influences were in there five months later, when had I gotten protection of the Deputy Marshal's Office and the Bailiff's who were watching these jurors, had they done their job and not committed some crime, I wouldn't have a verdict that exists there today without your investigation. I would have had my mistrial, and I ask that the Court give me that, and if it doesn't give me that, to let me put on the evidence that the

Court knows exists that a Marshall had that complaint and did nothing about it and never told Your Honor.

The Court is aware that Mrs. Broff testified that she gave that complaint, and the Court is aware it didn't get or hear about that, and I can put a timing on it, and I can put what happened to it, and I can put the relationship of Dario together, and I can do all of that for the Court to show that it did in fact happen, but I understand from the Court that it's aware that it did happen.

THE COURT: All right. The sloppy way, if we can put it that way, in which this matter was handled by some of the court security people or by the Marshal's Office is a matter that I fully intend to take up with them and have some action taken on that in the manner in which it was done, and I waited all this time because of this hearing. I didn't want to do it before this hearing. That will be something that I have to take up with the Marshal's Office between us.

You're telling me, however, that that is a basis for a new trial.

MR. ROSEN: Your Honor, I am telling you that you cannot weigh our basis for a new trial after verdict.

THE COURT: All right.

MR. ROSEN: You have to weigh it with the Marshal's violation of their duty in not bringing to your attention the facts then. You should allow me to put into evidence, Your Honor, those facts which you would have been permitted to hear six days before the verdict was rendered, not five months after it was rendered. You are—

THE COURT: —What facts are you talking about, sir?

MR. ROSEN: If the Marshal's Office gave you that report five days before the verdict was entered, the Court would have learned that what was going on in the jury room were that four jurors were being coerced into a verdict against their will by Mr. Mullins. The Court would have learned that Mr. Mullins was prejudiced in favor of Tesoro from day one. The Court would have learned that Tammy Albrecht—

THE COURT: —This is what you're going to tell me you're going to show? I know that, of course, what you just said, that they didn't report the—the Marshals didn't report to me any complaint made, but coercion and all that in the jury room, that is intra-jury business and does not affect a motion for a new trial.

MR. ROSEN: Your Honor, what I am saying to you, please, the Court has to understand what I am saying. What I am saying to you is that the coercion with respect to the verdict, and the intimidation and the fear into rendering it for Tesoro—

THE COURT: —Mr. Rosen, I can't let you—I questioned the jurors, and not a one of them indicated they were—

MR. ROSEN: —You didn't ask, Your Honor.

THE COURT: They had every opportunity to tell me what—

MR. ROSEN: —Your Honor—

THE COURT: —They were in and out of my office just one at a time, they weren't together.

MR. ROSEN: Your Honor, you said to them specifically, your opening question was, "Don't tell me one thing about what happened in the jury room"—

THE COURT: —Because that is the law, Mr. Rosen.

MR. ROSEN: Your Honor, but what I am saying to you—

THE COURT: —That is the law.

MR. ROSEN: What I am—

THE COURT: —That is the statute.

MR. ROSEN: Your Honor, that statute talks about after verdict. I am saying that the Court should treat this investigation as if it had that information before the verdict if the Marshal's Office didn't cover up the message.

My position is that the Judge is putting on me the burden of complying with the competency of a juror to be a witness after the verdict, when in fact the investigation that the Judge is making now should have been made five days before the verdict.

If the Judge had asked those questions five days before the verdict, he would have heard much more information because he wouldn't have been restricted to say you can't tell me what is going on. Because that's when the Court should have been told.

By virtue of the conduct of a Marshal and the Marshal's Office covering that message, the Court never made the investigation, Plaintiffs never had their rights, and I'm asking this Court to give me those rights. And what this Court is doing is treating that as if I have to prove only limited amount of information without having any right to talk to a juror, with having nothing to do except talking to the Marshal's Office, when the Court should protect me, protect me as of then, not now.

If the Court protects me as of then, I am treated fairly. The Court is treating me today with this information, but the Marshal's Office got that message five days to a week before the verdict and never did anything about it. You learned about it for the first time yesterday from Mrs. Broff. She confirms it that she went out there because Mullins wouldn't write to you to tell you, so she goes out there to tell a Marshal to get a message to you that there's information in that jury room—

MR. MILLER: —Wait a minute. I wish to object to this, Your Honor. What Mrs. Broff said is at page 4584. She said, "I told a security officer, I asked him if during the trial we were supposed to talk to security officers, and he said no, because Tammy would go out there everyday to talk to one of the security people, so that's why I thought maybe a security officer was leading her on to Tesoro's side because she knew about Dr. West's wife, and unless she knew Dr. West, how—unless she knew Dr.West, how would anybody know about that situation."

That's all she said. She never said one word about all of this mewling here at the stand about what's supposed to have happened in that jury room.

MR. ROSEN: Excuse me, Your Honor. He just left out the rest of the sentences. The Court, "Okay." So Mrs. Broff says, "So I told him." And then later on, she says, "Right. Now, I don't know how she would have found that out. I thought, you know, he might have told her, so I told the security guard."

Your Honor knows that the security guard's prepared to testify he got that exact complaint, and that the complaint was that, quote, "Was told that Tammy knew too much about the case not testified to." And that the security guard's prepared to tell you that that complaint did in fact take place that Mrs. Broff told you in that jury room she made.

Now, what I am saying to the Court is that if a juror feels so compelled with her duty to try and get a message to you from her foreman and he won't write it, and she signals and gets a court security officer and tells him of a complaint that Tammy has information in that jury room she shouldn't have, she's telling it to him, not for him to tell his wife. She's reporting a complaint, and the court security officer will tell you that they treated it as a complaint to get to the Court to be told to you, and it wasn't told to you, and I was entitled to have it told to you.

And the fact that you deal with your Marshal's Office separately doesn't protect the Plaintiffs. The only thing that protects the Plaintiffs is for you to take action on that complaint as if you heard it. What you're doing is taking action on the complaint after the verdict and limiting me. That's not what I'm entitled to.

THE COURT: All right. That's your position?

MR. ROSEN: Yes, Your Honor.

THE COURT: All right. That's your position in the whole—in your efforts here to get a new trial.

MR. ROSEN: No, I have other grounds, Your Honor. May I—

THE COURT: What other grounds do you have?

MR. ROSEN: I have the grounds that are in my motion. The Court yesterday did not ask one juror whether or not they had figured out that Miller was Murphy. I was prepared to put on as part of my—

THE COURT: —That's your first—this is your motion for a new trial?

MR. ROSEN: Yes.

THE COURT: I'm not going into that.

MR. ROSEN: Okay. Then I have—let me go into telling the Court what I would like to have the record left open for.

Again, there is a tape of Mr. Stewart and the FBI in which he disclosed to the FBI that which that which [sic] the Marshal's Office didn't do five to ten days—five days to a week before the verdict. There is that tape that has on it this information that is in the U.S. Attorney's Office that has been transcribed.

The Court, by not permitting me to talk to the U.S. Attorney's Office and receive any information, I'm unable to deliver the Court the tape.

THE COURT: I have seen the tape.

MR. ROSEN: All right.

THE COURT: I've seen the transcript of the tape.

MR. ROSEN: I would like the record to include that as part of our motion.

THE COURT: All right.

MR. ROSEN: I'd like for the record in this case to be kept open until you finish your investigation with your Marshal's Office, until Federal Government finishes its investigation into jury tampering, so that this record may be supplemented by additional facts, whether from jurors or any other source that would add and [sic] to these claims of outside influence.

THE COURT: That's what you're asking for?

MR. ROSEN: Yes, that's what I'm asking the Court to do.

THE COURT: Thank you. Go ahead.

MR. ROSEN: It is also our position that the Court never asked any of the other jurors, that is other than Tammy and Mullins, the Court never asked any of the other jurors whether or not Mr. Mullins and Tammy were predetermined in favor of Tesoro from day one. We know that that is a fact the Court didn't ask them, but we ask that the Court consider that as part of the facts of our motion.

THE COURT: All right. Let me take a recess right now.

MR. ROSEN: Thank you.

MR. PRIMOMO: All rise.

(Fifteen minute recess)

THE COURT: Thank you. First of all, regarding the questions submitted by the Plaintiffs to be asked of the jurors, those questions were not submitted by them until three jurors had already been questioned, including Mr. Mullins. All right.

Gentlemen, I have considered the testimony of the jurors, what you, Mr. Mullins (sic), have said here and what you intend to offer, and all of the allegations in Plaintiffs' motion and supplement to the motion for a new trial, and the Court is going to overrule the motions. There will be a written order going into more detail by the Court.

Now, Mr. Rosen, did you know that there was a man by the name of Jack Compton who was contacting the jurors contrary to this Court's orders? Now, the jurors have indicated to me that he was representing the Plaintiffs.

Well, the Court intends to look into that, as well as the business of the Marshal's handling of the matter.

Gentlemen, that is the rulings of this Court. Any other motions that are pending will be dealt with by me later. We'll be in recess.

MR. MILLER: Your Honor, may I mention one thing? The transcript of the interrogation by the court of the jurors that served in this case has been made available to counsel, and in the interest of protecting the confidentiality of that report and the privacy of the jurors, I would like to ask the Court to instruct all counsel and all associated personnel not to turn that report over to anybody else or to the press. I'd like to ask Your Honor to give that instruction.

THE COURT: All right. That instruction will be given by the Court now. Thank you. (Pause)

The press already knows about the interview with the jurors and the contents of it, at least some of it.

MR. MILLER: I wasn't aware of that.

THE COURT: Well, I'm sorry, but apparently they were told about it.

MR. MILLER: Well, I'm sure they know of the interrogation. I'm not aware that they have a transcript of the proceedings.

THE COURT: Oh, they don't have a transcript.

MR. MILLER: What I'm asking is that the Court instruct all parties and the counsel and all associated personnel not to turn over to the press or any other third party, that transcript.

THE COURT: The transcript itself.

MR. ROSEN: Excuse me, Your Honor. I do believe that's a violation of the First Amendment, a constitutional violation to prevent that information from being known by the public.

THE COURT: Well, the public knows about it already.

MR. ROSEN: Well, the press is the public, Your Honor, and I don't think the Court—

THE COURT: —That's what I'm talking about. They know about it from yesterday.

MR. ROSENFELD: Your Honor, there's also plenty of Fifth Circuit precedent for sealing these kinds of in camera juror interviews—

THE COURT: —I'm not going to get into any of that. I've ruled already and that's it.

MR. ROSEN: I don't understand the ruling of the Court so I can be clear. Is the Court saying that the transcript—

THE COURT: —The transcript—that transcript that was typed by the Court Reporter is not to be handed out to anybody. Now, you may talk about the contents.

MR. ROSEN: Thank you, Your Honor.

(Hearing adjourned)

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